This is a digital copy of a book that was preserved for generations on library shelves before it was carefully scanned by Google as part of a project to make the world's books discoverable online.

It has survived long enough for the copyright to expire and the book to enter the public domain. A public domain book is one that was never subject to copyright or whose legal copyright term has expired. Whether a book is in the public domain may vary country to country. Public domain books are our gateways to the past, representing a wealth of history, culture and knowledge that's often difficult to discover.

Marks, notations and other marginalia present in the original volume will appear in this file - a reminder of this book's long journey from the publisher to a library and finally to you.

Usage guidelines

Google is proud to partner with libraries to digitize public domain materials and make them widely accessible. Public domain books belong to the public and we are merely their custodians. Nevertheless, this work is expensive, so in order to keep providing this resource, we have taken steps to prevent abuse by commercial parties, including placing technical restrictions on automated querying.

We also ask that you:

+ *Make non-commercial use of the files* We designed Google Book Search for use by individuals, and we request that you use these files for personal, non-commercial purposes.
+ *Refrain from automated querying* Do not send automated queries of any sort to Google's system: If you are conducting research on machine translation, optical character recognition or other areas where access to a large amount of text is helpful, please contact us. We encourage the use of public domain materials for these purposes and may be able to help.
+ *Maintain attribution* The Google "watermark" you see on each file is essential for informing people about this project and helping them find additional materials through Google Book Search. Please do not remove it.
+ *Keep it legal* Whatever your use, remember that you are responsible for ensuring that what you are doing is legal. Do not assume that just because we believe a book is in the public domain for users in the United States, that the work is also in the public domain for users in other countries. Whether a book is still in copyright varies from country to country, and we can't offer guidance on whether any specific use of any specific book is allowed. Please do not assume that a book's appearance in Google Book Search means it can be used in any manner anywhere in the world. Copyright infringement liability can be quite severe.

About Google Book Search

Google's mission is to organize the world's information and to make it universally accessible and useful. Google Book Search helps readers discover the world's books while helping authors and publishers reach new audiences. You can search through the full text of this book on the web at `http://books.google.com/`

SARSWELL CO., Limited
Bookbinders,
PRINTERS,
LAW BOOKS,
TORONTO

Pierpont

THE

LAW QUARTERLY REVIEW.

EDITED BY

SIR FREDERICK POLLOCK, BART., M.A., LL.D.

CORPUS PROFESSOR OF JURISPRUDENCE IN THE UNIVERSITY OF OXFORD.

VOL. X.

WITH A GENERAL INDEX TO VOLS. I—X.

LONDON:

STEVENS AND SONS, LIMITED, 119 & 120 CHANCERY LANE.

AGENT FOR UNITED STATES OF AMERICA, THE BOSTON BOOK CO., BOSTON.

AGENT FOR CANADA, THE CARSWELL CO. LIMITED, TORONTO.

OXFORD: AT THE CLARENDON PRESS.

1894.

Oxford
HORACE HART, PRINTER TO THE UNIVERSITY

LIBRARY OF THE
LELAND STANFORD, JR., UNIVERSITY
LAW DEPARTMENT.

THE

LAW QUARTERLY REVIEW.

No. XXXVII. January, 1894.

NOTES.

The Last Days of Bondage in Great Britain.

In the light of Mr. Leadam's most interesting article on 'The Last Days of Bondage in England,' which appeared in a recent number of the Law Quarterly Review [1], it may be well to note that, while bondage came to an end in England towards the end of the sixteenth century, it only disappeared from Great Britain within the lifetime of people still living. Down to the year 1799 a large number of the Scottish colliers and salt-workers, or 'salters' as they were called, were literally slaves. They belonged to their respective works and were sold as a part of the gearing. They could not leave at will, nor change their occupation. Generation after generation lived in this state of servitude, for, while the servitude was not hereditary in the eye of the law, it was so in practice. The child of a bondman, if never entered with the work, was free, but, belonging as it did to a degraded and avoided class, entering was its natural destination, especially as the owner of the work prevented to the best of his power the possibility of its getting employment in the neighbourhood. The Scottish Habeas Corpus Act passed in 1701, which provided for the liberty of the subject in Scotland and introduced regulations against 'wrongous imprisonment and undue delay in trials,' contained these words, 'it is hereby provided and declared that this present Act is noways to be extended to colliers or salters.' The first Act passed for their relief became law in 1775. This statute (15 George III. c. 28), after stating in the preamble that 'many colliers and salters were in a state of slavery and bondage,' emancipated all those who should begin to work as colliers and salters after the first of July 1775,

[1] Vol. ix. p. 348.

76912

and provided for the gradual liberation of the existing bondmen. This Act did not work well. While it effectually prevented new slavery, it required any existing bondman, who desired to obtain his liberty, to institute legal proceedings for that purpose, with all the accompanying expense and delay. Few of the existing bondmen could take advantage of it. In June 1799 another Act (39 George III. c. 56) was passed, providing that 'all the colliers in Scotland, who were bound colliers at the passing of the fifteenth George Third, chapter 28, shall be free from their servitude.' With this Act perished the last relic of legal slavery in the island of Great Britain.

There was a colony of these salt-workers at Prestonpans near Edinburgh. They were the lineal representatives of the old *nativi*, neyfs or villeins, attached to the Abbey of Newbattle, the monks of which had been the first to work the salt works there. These salters formed a race apart. Sunk in hereditary degradation, they were disliked and shunned by all their neighbours. It was not until some time had elapsed from their final emancipation that the evil effects of this slavery disappeared. William Chambers, of Edinburgh, recorded in his 'Memoir' that, when he was a young man, these poor creatures set aside one day in the year as a festival commemorative of their liberation. And this was in Scotland and in the nineteenth century! J. A. Lovat-Fraser.

Stephen Martin Leake.

It was an inadvertence that our last number should not have recorded the loss to legal study caused by the death of Mr. Stephen Martin Leake. The outlines of his uneventful life were set forth in obituary notices at the time: and we need only to note the rare combination of circumstances which has given to us a series of legal treatises so clear in design, so ample in treatment, so practical in character.

Mr. Leake was born in 1826. He was called to the Bar in 1853; he retired from the active work of his profession, partly from fear of increasing deafness, in 1863. Thenceforth he lived on his property in Hertfordshire until his death.

Men have retired before now into the country to obtain quiet and freedom from interruption for the pursuit of abstract inquiry, or the contemplation of natural phenomena; but it is seldom indeed that the life of a country gentleman is also a life of close and continuous study bearing on a subject wherein principle and precedent have to be constantly applied and moulded to the changing conditions and the practical business of every day. For

Mr. Leake, though he ceased to practise at the Bar, did not become a speculative jurist. Whether he treats of the rules of pleading, the law of contract, or the law relating to interests in land, he kept in view two objects which make his work valuable alike to the student and the practising barrister. He supplies all the information that the reader is likely to want, and he supplies it in the place where a sensible reader is likely to expect to find it. To say that books are stored with knowledge, and that this knowledge is well arranged, may not seem to say very much. But those who know the mass of detail which, in some sort of arrangement, goes to make up a legal treatise; those who have wandered in the wilderness of ill-compacted learning of which so many text-books consist; still more, those who have tried for themselves to select and arrange the material for a work on any great department of our law, will appreciate, to the full, the happy combination of learning and method displayed in the writings of Mr. Leake.

His works were three in number. With Mr. Bullen he published in 1860 the well-known Precedents of Pleadings, which passed into a second edition in 1863, and a third, for which Mr. Leake was alone responsible, in 1868. Although the forms of pleading here set forth are no longer in use, it would be a mistake to suppose that the book is obsolete: it is a storehouse of good law clearly put. His book on Contract, which appeared in 1867, was in its first edition the most scientific treatise on this branch of law, and in its later editions the most exhaustive Digest of the subject. His work on the law relating to land was not carried out to the full. The first volume (1874) contained two parts, the Sources of the law of Property in land, and the various Estates and Limitations of interest in land; the second volume (1888) contained one part, the law relating to Uses and Profits of land. Two more parts were contemplated; one dealing with the Transfer of Property in land; the last with the law of Persons in so far as it modified the general law of real property. The whole was designed to constitute a Digest of the land-law, with which the author hoped to aid the labours of the student, the practitioner, and the law reformer. So much as we possess of this great work exhibits the general characteristics of Mr. Leake's treatment, its learning, its method, its unpretending clearness of style.

No class of literature is more evanescent than the legal text-book; the Courts and the legislature are always at work upon its materials, and by the time it is appreciated it has ceased to be authoritative. The text-book writer would seem to have inscribed his name upon the sands; and yet the man who has produced a clear and full statement of any one branch of our current legal

system has deserved well of his generation, and makes a solid contribution to the history of English law. Among the many eminent writers whom that history records some place will surely be found for the great learning, the clear intellect, the patient unselfish industry of Mr. Leake. W. R. A.

The pleadings and other proceedings in the Behring's Sea Arbitration bind up into seven or eight folio volumes, containing much interesting matter. The proceedings at Geneva in 1872 were equally lengthy, but lost much in value from the fact that the arguments on that occasion started from the *ex post facto*, arbitrary and now generally discredited 'Three Rules of the Treaty of Washington.' The Paris tribunal, on the other hand, was free to declare and apply the generally received principles of International law. Even if its award can hardly be cited, to use the words of the leading counsel for the United States, as 'an oracle to which present and future times as well may appeal, as furnishing an indisputable evidence of what the law of the world is,' there can be no doubt that the opinion of M. de Courcel and his colleagues will go far to settle several questions, such as the extent of territorial waters, upon which some difference of view has hitherto been possible. The authority of so august a body was hardly needed to negative the proprietary right of a nation in free-swimming creatures which may happen during part of the year to resort to its territory. Many topics with which the arbitrators were not directly concerned were discussed in argument, such as the origin of property, the possibility of acquiring jurisdiction over an open sea by acquiescence, the interpretation of statute-law when in apparent conflict with the Law of Nations, and the whole question of the nature and sources of International law, which Mr. Carter derived mainly from the 'Law of Nature,' while Sir Charles Russell defined it in a way which is open to little objection, except that he would seem to exclude from its scope such positive rules as are morally indifferent. 'International law,' says Sir Charles, 'properly so called, is only so much of the principles of morality and justice as the nations have agreed shall be part of those rules of conduct which shall govern their relations one to another.' Elsewhere he well remarks that International Law 'has long passed the stage at which an appeal to any vague, general principles can afford any safe, certain resting-place, or guide at all. It is now, and it has long been, a body of derivative principles and concrete rules, formed by the action and reaction upon each other of custom, moral feeling, and convenience.' T. E. H.

There seems no reason why the Sale of Goods Bill should not receive the Royal Assent before the end of the Session, and a third step thus be taken towards the codification of those portions of the law which most affect commercial dealings. Judge Chalmers and the Lord Chancellor may then be congratulated upon having, the former by his draftsmanship, the latter by his advocacy, added to the statute-book a measure which, if it cannot hope for the ready acceptance which has attended the Bills of Exchange Act, is certain powerfully to influence the development, and greatly to facilitate the study, of a most important branch of law. It is easy to say that we ought to begin with the general rather than with the particular, with the principles of Contract rather than with Sale or Partnership; and it is easy to criticize details in the treatment of questions upon which the best brains have been at work for centuries. It is not so easy to select a topic of everyday utility to everyone, to reduce its rules to manageable dimensions, and to defend them as re-stated for five years against all comers.

Since its first introduction into Parliament, in 1888, the Bill has been modified in several respects, not always, perhaps, for the better. The sections relating to the Contract of Exchange have been very properly omitted; but the special law relating to the sale of horses, which was to have been neatly consolidated into a sort of footnote, is now left outstanding; and the symmetry of the whole is not a little impaired by its extension to Scotland. One is inclined to grumble because sect. 2 touches upon the incapacity of infants, which is by no means confined to their purchases. 'Necessaries,' for instance, may just as well be services rendered as goods supplied. One may have misgivings as to the adequacy of the treatment of 'warranty'; one may fail to see why the re-vesting of goods on conviction should come into the Bill at all; and one looks in vain for the enactment now hidden away in the County Courts Act, which provides that no action shall be brought for the price of ale and certain other liquors consumed on the premises. But the only way to make a department of law at once symmetrical and complete is to get it stated in a series of propositions; and from this point of view there would be much to be said in favour of even avowedly tentative codification.

The fortunes of this Act, when it comes into operation, will be watched with much interest, as indicating, in a way which could not be expected from Acts dealing with the comparatively isolated topics of Bills of Exchange and Partnership, the attainability, within a reasonable time, of a Civil Code; which should doubtless include all the topics which on the continent are usually relegated

to a separate Code of Commerce. Codification must come, but, if we are to escape the disadvantages which its critics are not unreasonably given to predicting, it must be carried out systematically, and by means of a larger supply of specially trained ability than has yet been devoted to it. T. E. H.

Searching criticism like that of Lord Macnaghten (*Ward* v. *Duncombe*, '93, A. C. 369) on the rule in *Dearle* v. *Hall* is always valuable, though the rule itself (as distinguished from the grounds of it) is now beyond criticism. Though first formulated by Sir T. Plumer it grew naturally out of the analogous principles of *Ryall* v. *Rowles* (1 Ves. 348), and the practice of conveyancers advising notice to the trustees on assignment of a trust fund—a practice which, as James L.J. said in *Re Ford* and *Hill* (10 Ch. Div. 365, 370), is itself part of the common law. The mistake which Sir T. Plumer made was in laying stress on the negligence of the assignee as postponing him; for negligence is relative, it implies a duty, and an assignee of a trust fund owes no duty to a subsequent assignee. It is a matter of *title, not negligence.* 'The law of England,' as Sir T. Plumer said, 'has always been that personal property passes by delivery of possession,' and giving notice is in the case of a trust fund or other chose in action the only way in which possession can be taken. It is constructive or *quasi* possession. Why the law of England attaches this importance to possession or *quasi* possession is plain. It prevents the assignor dealing with the property as apparent owner, to the detriment of subsequent assignees. This is the element of truth in Sir T. Plumer's theory of negligence or constructive fraud, it is the principle of *Ryall* v. *Rowles*, and a perfectly sound one. Once given the notice is good for always. Any other view would lead, as Lord Macnaghten said, to an unseemly 'scramble for priorities' on the appointment of new trustees.

An over-zealous servant is a danger to his employers, especially when as in the case of a railway porter his duties are multifarious and undefined. Not long ago a railway company was contesting the authority of its porter to take charge of a passenger's luggage for ten minutes while the passenger went to get his ticket (*Bunch* v. *Great Western Railway*, 13 App. Cas. 31). Now we have a railway company disputing a porter's authority to remove a passenger from a carriage for just cause (*Lowe* v. *Great Northern Railway Co.*, 62 L. J., Q. B. 524). Unfortunately for the company in this case, there was no just cause. The porter, with the best intentions of doing his duty, had bundled a passenger out of a carriage, under an erroneous impression that he was a pitman and ought to be travelling in

a carriage specially appropriated to such persons. Railway companies would not be railway companies if they did not contest, reasonably or unreasonably, every liability with which they are sought to be fixed: but it would be highly inconvenient if a porter had not such a power of removal where a passenger is misconducting himself. Whether railway companies like it or not, the necessities of the public become the measure of the implied authority in such cases.

It is satisfactory to find that infants are not to have things all their own way. A pseudo-infant of twenty years and nine months who executes a marriage settlement knows quite well what he is about, and when he pleads incapacity the plea is a bare technicality, which the Court, taking judicial notice of the precocity of the modern infant, regards with small sympathy. It answers like Portia,

'He shall have merely justice and his bond.'

What the unconscionable infant in *Edwards* v. *Carter* ('93, A. C. 360) wanted was to keep his privilege of disaffirming his settlement in suspense until he saw how it was going to affect after-acquired property within the settlement when it fell into possession. This extravagant claim the Court made short work of. 'Solvuntur risu tabulae,' indeed it is difficult to see what relation such deferred election bears to the disability of infancy at all. Not much better was the contention in *Harris* v. *Beauchamp Brothers* (42 W. R. 37) that judgment could not be given against a firm with an infant partner. If this immunity were allowed every firm would keep an infant partner on the premises.

The story of the Howe Peerage (*Willis* v. *Earl Howe*, '93, 2 Ch. (C. A.) 545) 'staled by frequence,' has lost whatever elements of romance it once possessed, and serves now only to point a dry legal moral. Palming off a supposititious baby as heir to an estate (to suppose for a moment the story true) is certainly fraud, but fraud alone will not prevent the Statute (3 & 4 Will. 4, c. 27) running, because fraud may by diligence be discovered. It is only when fraud is concealed, and therefore incapable of detection, that the Statute does not run, for the very good reason that laches in such a case cannot be imputed. The mere taking possession of the estate on behalf of the infant (as in the Howe case) does not render the fraud incapable of detection. On the contrary it challenges inquiry. It was splendid audacity in the plaintiff to pose as the discoverer of a fraud, after novelist, newspaper and solicitor had all had their turn at the situation for a century. In fact *Willis* v. *Earl Howe*

sums up in itself all the elements which make up the policy of Statutes of Limitation: laches, the quieting of titles and 'finis litium.'

'The question for decision' when 'reduced to its simplest form, may be thus stated: Suppose an owner of deeds has placed them under the control of another, and has authorized him to pledge them for a certain sum, and suppose that he has pledged them for more with a person dealing with him *bonâ fide* and without notice of the limit of his authority, can the owner of those deeds redeem them without paying the full amount advanced upon them? The answer to this question is No.' (*Brocklesby* v. *Temperance Permanent Building Society*, '93, 3 Ch. (C. A.) 130, 140, judgment of Lindley L.J.) These words exactly sum up the point and effect of a case which to most readers must seem complicated. The complication, such as it is, arises from the intricacy of the mercantile transactions the effect whereof had to be considered by the Courts. But when once this is ascertained the principle applicable to the case is both obvious and well established. It is simply this: that a principal is bound to third parties by any act on the part of his agent which from the principal's own conduct a third party has a right to believe is within the authority of the agent, and this principle again which, if once clearly grasped, solves almost all the problems of the law of agency, is merely an application of the fundamental rule or axiom which governs the whole law of contract, viz. that a promisor is bound not by the promise which he means to make, but by the promise which by his conduct he has led the promisee to believe that the promisor means to make. It is always, in short, the apparent, not necessarily the real intention of a promisor by which he is bound. The law looks, as regards intention, and most wisely, to the natural result of a man's acts and not to the condition of his mind. From a legal point of view a person intends whatever he gives others reasonable ground for supposing that he does intend.

'The main question in this case' (*Wheaton* v. *Maple & Co.* '93, 3 Ch. (C. A.) 48) 'is whether the plaintiff, who has actually enjoyed the access and use of light to his dwelling house for the full period of twenty years without interruption before action brought over lands contiguous to his house—in this case in reality for forty years, for his house was built in 1852—is entitled to restrain certain lessees of the Crown from building upon such lands so as to obstruct his lights.' (Judgment of A. L. Smith L.J., p. 69.) The Court of Appeal has answered this question in the negative.

The answer rests on the simple ground that the plaintiff's right (if any) to lights arises under the Prescription Act, 1832 (2 & 3 Will. IV. c. 71), s. 3, but that section 3 does not bind the Crown, and the plaintiff therefore has no rights whatever. The decision is good law, but it results in very scant justice. There is certainly not a layman living who on reading the 3rd section of the Prescription Act, 1832, would not suppose, as the plaintiff in *Wheaton* v. *Maple* did suppose, that the plaintiff had acquired an 'absolute and indefeasible' right to light. This idea would no doubt have been erroneous, but it is no small evil that a law on which ordinary men have constantly to act should apparently mean one thing whilst it really means another. The time surely has come when the whole law of prescription may be reduced to a simple and intelligible form which might be understood by a layman of intelligence no less than by a lawyer.

No branch of English law is, as has been constantly remarked in these pages, so unsatisfactory as that portion of it which is created by judicial interpretation of Statutes. Take for example *Hill* v. *Thomas*, '93, 2 Q. B. (C. A.) 333. It is a decision on the meaning of the words 'extraordinary traffic' used in the Highways and Locomotives (Amendment) Act, 1878 (41 & 42 Vict. c. 77), s. 23. To any one who studies the case two points become apparent. The first is that neither judges nor magistrates have hitherto been able to make up their minds as to the true meaning of the words we have cited, and very possibly for the best of all reasons, namely, that the draftsman who drew and the legislature which passed the enactment in question attached no definite sense to a very vague expression. The second point is that even now the interpretation affixed by the Court of Appeal after great deliberation on the words 'extraordinary traffic' may cause a good deal of perplexity to magistrates and others engaged in the practical administration of the Highways, &c. Act, 1878. It seems to mean any traffic which is beyond the ordinary traffic over a given road. But, on the other hand, if the amount of traffic is not as a whole extraordinary, the use of the road by one person, say to tenfold the amount of its use by all other persons, does not constitute extraordinary traffic. From which it would seem to result that the habitual use of a road by one person can never in the long run constitute extraordinary traffic. For his user of it forms by degrees the measure of the ordinary or average traffic over a particular road.

N obtains furniture from *A* on the purchase and hire system. *N* while the instalments on the furniture are still unpaid, and

in violation of the agreement with *A*, sells the furniture to *X*, who buys it in good faith without any knowledge of *A*'s rights. *X* has a good title to the furniture against *A*. This is the point decided in *Lee* v. *Butler*, '93, 2 Q. B. (C. A.) 318. 'This,' says Lord Esher, 'is a very plain case, and the construction of the Statute is very clear.' The truth of this assertion is in one sense indisputable. The case falls precisely within the very words of the Factors Act, 1889, s. 9. *N* has 'agreed to buy goods' and 'obtains, with the consent of the seller [*A*], possession of the goods.' There is then 'delivery' by *N* 'of the goods' under a sale to *X*, who is a 'person receiving the same in good faith, and without notice of any lien or other right of the original seller' *A*. It follows then that *X* has under the Act a valid title. Compare the Factors Act, 1889, ss. 2 and 9. But though the words of the enactment are amply satisfied, many persons will feel that its spirit is violated. One thing is pretty clear. If the judgments of the Queen's Bench Division and of the Court of Appeal be, as they probably are, good law, either the Factors Act, 1889, must be amended, or the purchase and hire system must be given up or modified.

It is a dangerous thing to receive as a present fully paid up shares in a company formed under the Companies Act, 1862, when in fact nothing has been paid for them; the gift, should the company fail, will impose on the donee the necessity of paying up the full price of his shares. This is the moral of *In re Eddystone Marine Insurance Co.*, '93, 3 Ch. (C. A.) 9. It is an important one to all men engaged in business. Everyone must sympathise with the judges in regretting that quite respectable men who have acted with perfect honesty should suffer loss from receiving a well deserved present. But anyone who looks to the interest of the public and to the necessity of maintaining mercantile honesty must be glad that the principles of the Companies Act, 1862, should be rigidly enforced. Mercantile associations should not give presents.

What is a criminal proceeding? This is an inquiry to which it is not easy to obtain a clear and decisive answer. *Rayson* v. *South London Tramways Co.*, '93, 2 Q. B. (C. A.) 304, decides that a summons taken out against a passenger in a tram-car for having committed the offence under the Tramways Act, 1870, 33 & 34 Vict. c. 78, of avoiding, or attempting to avoid, payment of his fare is a criminal proceeding, and, if taken without reasonable and probable cause, will support an action for malicious prosecution. The character, in short, of the proceedings is not affected by the

fact that their object is to obtain payment of a penalty. The test by which to determine whether a proceeding is a criminal proceeding appears to be the character of the act in respect of which the proceeding is taken. If the offence complained of is in itself a misdemeanour then proceedings for a penalty are criminal proceedings, i.e. proceedings intended to punish a crime.

Bankers and business men will have to reconstruct their ideas a little after *Powell* v. *London and Provincial Bank* ('93, 2 Ch. (C. A.) 555). The practice of pledging certificates with blank transfers to secure an advance has become universal in the mercantile world. Convenience is all in its favour. The security may never want enforcing, but if it does, all the pledgee has to do is to fill up the transfer and get it registered. One little thing, however, in this transaction has been in danger of being forgotten—was in fact forgotten in *Powell* v. *London and Provincial Bank*—and that is that for the transfer to operate as a deed, it must be re-delivered by the pledgor after being filled up, delivery not being as yet an obsolete formality. It would soon become so if the Court had yielded to the argument addressed to it to presume 'omnia rite acta' in plain contempt of facts. Of course the pledge is good, in equity, apart from any deed, as an agreement to give a charge, but in a commercial shipwreck there is nothing for an incumbrancer like having a plank in the shape of the legal title to cling to.

The Court of Appeal had a very good opportunity in *Re Washington Diamond Mining Co.* ('93, 3 Ch. (C.A.) 95) of 'sticking in the bark' in construing the fraudulent preference section of the Companies Act, 1862. The difficulty arose from the mischievous practice, now so common among parliamentary draftsmen, of incorporating by reference the law of one subject into another, in the particular instance the bankruptcy law of fraudulent preference into winding up. They save themselves trouble and call it assimilating the law. If the analogy is perfect no harm is done, but the analogy seldom is perfect. It is certainly not so in the case of bankruptcy and winding up. There is in winding up a well settled rule that a contributory of a limited company cannot set off a debt against calls—a corollary from the fundamental principle (the price of the privilege of limited liability) that the capital must be paid up in full in cash. There is nothing like this in bankruptcy. Hence the Court of Appeal had to torture the section to make it fit the requirements of company law. It was well they could, for this impeached transaction is far too common. Directors, that is to say, vote fees to themselves when the ship is sinking, and set off the sum against liability on their shares.

Lunacy plus pauperism is the most abject state to which humanity can be reduced. Beside it a creditor not getting paid his debt is a very petty grievance. The Court had long ago to weigh these two evils in the scales of justice, to determine whether a helpless lunatic was to be stripped by his creditors or to be maintained, *durante vitâ*, at their expense, and it held that the stronger claim lay with the lunatic. The creditor in such a case is not denied justice. He is merely delayed till the lunatic's death. The only point in *Re Plenderleith* ('93, 3 Ch. (C. A. 332)) was whether the fact that the creditor had got a charging order made any difference. The Court had no difficulty in holding it did not. To allow such a thing would nullify the beneficent jurisdiction of the Court, for every creditor would get one.

The Court of Chancery has incurred a great deal of popular odium and obloquy 'traduced by ignorant tongues' but whatever be its sins and shortcomings its protecting care of lunatics and infants, not to speak of unprotected women, will always redound to its honour.

Somerset v. *Poulett* (62 L. J. Ch. 720) is stuffed full of morals, morals for trustees, for tenants for life, for surveyors, for solicitors. By the way, why is this case, which Kekewich J. described as 'the most difficult and most important of pure Chancery cases' which had ever come before him, not in the Law Reports? It was the old story of the importunate tenant for life and the good-natured trustee—the tenant for life wanting to improve his income and the trustees relying on the advice of others instead of using their own judgment. The case illustrates more especially the remedial operation of the Trustee Act 1888 (now the Trustee Act 1893). Instead of the security being thrown back on the trustees, it is now allowed to stand for the proper amount, but even this alleviation left the trustees liable for an over advance of nearly £10,000. Tenants for life will tremble when they read of Kekewich J. impounding the life interest of the tenant for life under sect. 6 of the Act to assist in recouping the trustees, but this severity the Court of Appeal abated, holding that the breach of trust in the section must be an act which is itself a breach of trust, not one which becomes so by reason of the want of care on the part of the trustees (28 L. J. 783). It is just as well, however, that tenants for life should know the risk they run in beguiling trustees to their ruin.

The law certainly wants popularizing. Foreigners may be forgiven for thinking that an Englishman sells his wife at Smithfield seeing there are records of Black Country savages having claimed

to exercise some such supposed common law right. But in *Whitworth* v. *Whitworth* (62 L. J., P. D. & A. 71) we have a husband, a not illiterate person, signing a paper providing that the parties should live separate and that each might marry again (which they proceeded to do) and actually believing bona fide that he might do so. A hardly less crude matrimonial fallacy (*Chudley* v. *Chudley*, 69 L. T. R. 348) is that a husband cannot desert his wife if they are temporarily parted. This, to use an old judge's expression, is 'worse than false. It is a heresy.' The reciprocal duties and obligations arising out of marriage are many and complex. Cohabitation is one, but it is only one. It may be dispensed with for a time by the consent of both parties, as when a husband goes to look for work in the Colonies, or a wife goes to her mother for her confinement (*Chudley* v. *Chudley*), but the suspension of one of the obligations of the spouses does not affect the rest. The husband is still bound to maintain his wife, he is still the guardian of his children, and these duties he cannot by any absence abdicate.

Reichardt v. *Sapte*, '93, 2 Q. B. 308, raises a curious question which it does not decide. Suppose that *A* and *B* each compose a play without any communication with each other, and without any knowledge of each other's work. Suppose, further, that the two plays are substantially alike. Have *A* and *B* each a right to the exclusive representation of his own play? Mr. Justice Hawkins is clearly inclined to answer this question in the affirmative. It is clear, we may add, that this extraordinary coincidence between *A*'s drama and *B*'s drama can in practice only arise when *A* and *B* have each stolen their ideas from some more original writer, probably from a French playwright. In point of justice and common sense there is certainly no reason why under these circumstances the rights of each party should not be precisely equal. Indeed there might be a good deal to be said in favour of a law which refused every kind of privilege to the author of a drama which is a mere adaptation of a foreign piece.

A decision such as *In the Goods of Marchant*, '93, P. 254, shows that the formalities apparently required by the Wills Act, 1837, may to a considerable extent be evaded. A testator may execute a short document bequeathing to *A* all his property for the purposes mentioned in another unexecuted document. The document need not be distinctly referred to or designated in the will. It does not in fact form part of the will. Yet whoever takes out probate of the will, will be compelled to carry out the trusts described

in the unexecuted document. In other words, effect is given to a will which is not properly executed.

The December Law Reports are good reading, but owing to their bulk we can only notice a few of the more interesting cases.

The rule that an executor may pay a Statute-barred debt at any time before decree is one of the time-honoured anomalies of our English law. No one, as Cotton L.J. said in *Re Rownson* (29 Ch. Div. 358), quite knows the origin of it, but it was probably due to a feeling that it was unconscionable to set up the Statute. But an executor has nothing to do with these expensive feelings. His duty is to protect the estate and pay only enforceable claims, and if he chooses against the wishes of his co-executor to pay a debt which has been judicially declared statute-barred he must take the consequences of a devastavit (*Midgley* v. *Midgley*, '93, 3 Ch. (C. A.) 282). There was no martyr's crown either for the executor in *Midgley* v. *M.*, for he had paid the debt only with a reverted eye to his own interest. Solicitors whose zeal outruns their discretion will also find a warning in this case.

To have towers, wings, and a vestibule to your mansion-house as well as first-class stabling, is a perfectly legitimate ambition. Bacon thought you could not have a 'perfect palace' without them: only they are the sort of fancies a man must pay for out of his own pocket, not out of capital moneys under the Settled Land Acts. (*Re Lord Gerard's Settled Estate*, '93, 3 Ch. C. A. 252.) These Acts make no provision for 'beautifying an ugly house.' The improvements on which they sanction expenditure are severely, not to say basely, utilitarian, such as drains, roads and saw-mills. True such improvements as stables, bath-rooms or billiard-rooms might be sanctioned under the Settled Land Act, 1890, if they were necessary for the letting of the mansion-house, but this again is business, not aestheticism.

It is a nice point of legal casuistry, that raised by *Bernstein* v. *Bernstein* ('93, P. (C. A.) 292). A husband knows of his wife's adultery with *A* and condones it: but he does not know at the time he does so that she has also committed adultery with *B*, *C*, and *D*. Is the condonation—so far as *A* is concerned—good? The Court of Appeal say yes, which is the more generous construction and also the truer. Condonation is not a *restitutio in integrum*, but it is a blotting out for good of the condoned offence. If it were conditional, subject to reservation and retractation, it would soon come

to mean nothing. As it is, it often saves wedlock from the misery and scandal of the Divorce Court.

In speaking of Earl-Bishop Odo, the first of our English Justiciars, Lord Campbell says, 'in the former capacity he left behind him a natural son,' &c. The solicitor ('93, 2 Q. B. (C. A.) 439) who let his houses at Bristol as brothels, sought to draw a somewhat similar distinction between his character of solicitor and of landlord. Why should he be struck off the Rolls for an offence committed as a landlord? It was ingenious but ineffectual. The distinction of *personae* is important in jurisprudence, but in the domain of morals or conduct this Jekyll-Hyde theory is too metaphysical. How are we to know that the person in the ascendant is a fit and proper person to be on the Roll?

When a husband makes his wife a present of jewellery within two years before his bankruptcy, this is a voluntary settlement within the meaning of sect. 47 of the Bankruptcy Act, 1883. So *Re Vansittart*, '93, 1 Q. B. 181 (No. 1) decided. But what if the wife has pawned the jewellery in the meantime? Is the pawnbroker to be simply wiped out by the trustee in bankruptcy; as he must be if the section is to be read strictly as making the settlement 'void?' To satisfy the fitness of things, Vaughan Williams J., in *Re Vansittart* (No. 2) 193, 2 Q. B., 377, and *Re Brall*, '93, 2 Q. B. 381, construes 'void' as 'voidable,' and reads into the section a saving clause in favour of a bona fide purchaser for value. Acts of Parliament have to be rationalized in this sort of way.

It seems convenient to repeat in a conspicuous place that it is not desirable to send MS. on approval without previous communication with the Editor except in very special circumstances; and that the Editor, except as aforesaid, cannot be in any way answerable for MSS. so sent.

THE GERMAN CODE OF CRIMINAL PROCEDURE.

THE year 1877 is famous in the annals of German legislation, for in this year were passed what are known as the Laws of Justice (*Justiz-gesetze*); that is to say, the Code of Judicial Organization, the Code of Civil Procedure, the Code of Criminal Procedure, and the Bankruptcy Code.

The Code of Criminal Procedure was passed on February 1, 1877, and came into force on October 1, 1879. Some of the principal features of the German judicial system have their origin in the primitive customs and procedure in force among the ancient Germans. It is not necessary to notice these at any length; their history has been very similar among all races of Teuton origin.

The original principle which ruled penality was private vengeance, exercised by the victim or his relatives (*faida*, *fehde*). A few acts of a specially grave or shameful nature were regarded as a direct attack on the public safety or national honour, and were visited with public punishment[1]; but the majority of crimes merely gave rise to individual reprisals. As the unrestricted right of vengeance would have caused a state of perpetual warfare, as harmful to the peace of families as to the interests of the State, the criminal was allowed to escape the terrible consequences of his crime by paying to his adversary a money payment or composition (*Wehrgeld*). This transaction was sanctioned by the public authority, which received a sum of money (*Fredum*, *friedensgeld*) as the price of its intervention. Gradually it came to be perceived that the crime harmed interests higher than those of the particular persons injured, and private vengeance gave way to a system of public punishment.

Early justice used to be administered with the aid of assessors (*Scabins*, *Scabini*, *Schöffen*), who heard orally the testimony of persons having knowledge of the offence. If proof was not complete, but there were grave presumptions of guilt, the Rachimbourgs or Scabins could order the accused to purge himself of the accusation, either by the purgatorial oath, or ordeal, or challenging his adversary to single combat. In the first case, the accused affirmed on oath that he had not committed the act imputed, and produced, in support of his affirmation, a certain number of

[1] See Tacitus, *De moribus Germanorum*, c. xii.

honourable men[1], who spoke to his good reputation, and declared him incapable of perjuring himself. If he could not produce the requisite number of men, it only remained for him to submit himself to some ordeal or to claim the judicial combat. Torture was commonly resorted to in order to compel a confession of guilt. It was strictly permissible only in the case of slaves; but as a matter of fact it was resorted to against freemen also. The system of jurors or assessors continued to the middle ages. Each court was composed of a judge (*Richter*) and of persons (*Urtheiler*) whose duty it was to appreciate the facts and *find* the judgment. In the ordinary courts the duty of deciding the question of culpability was confided to all the freemen present at the hearing or to a limited number of hereditary or elective assessors (*Schöffen*). When the number was limited, it was generally seven, and sometimes twelve[2]. At first prosecutions were left to be instituted by the victim or a member of his family. Subsequently the assessors were charged with bringing offences to justice. The guilt or innocence of the accused was determined by a majority of voices.

Penal procedure in the middle ages was marked by the following features: the necessity of an accusation to put the judicial machinery in motion, the absence of any preliminary inquiry, the evidence at the hearing of the parties, the oral and public nature of the proceedings, and the division of judicial functions between the assessors and the judge. The following innovations were introduced by the Roman and canon laws: the public prosecutor, written interrogatories, the establishment of the offence by means of a record of inquiry, secret inquiry, legal proofs, and judgment on written documents. The judge had merely to collect the documents furnished by the preliminary inquiry and gave his judgment on a perusal of the record. The confession of the accused was regarded as the best proof (*regina probationum*), and in order to get this, recourse was had to torture. The Ordinance of Bamberg required a confession even when the offence was proved by the depositions of witnesses, and in order to obtain such confession, prescribed the employment of torture; the Ordinance of Charles V[3] was more humane, and declared that if the accused,

[1] These men were called *conjuratores, sacramentales*. The excellence of the original jury system in England was that the jurors were men of the locality who knew the facts and the parties.

[2] Details are to be found in a number of medieval collections or books of law (*Rechtsbücher*), of which the most famous are known as the Sachsenspiegel and the Schwabenspiegel. They are both private works, with no legislative authority, intended by their authors to fix the rules consecrated by custom. They owed their success to their intrinsic value.

[3] These two celebrated Ordinances opened a new era in the history of German criminal law. Their influence, succeeding to that which had been formerly exer-

after sufficient proofs of his guilt, was unwilling to confess, it was to be explained to him that the judge had made up his mind, and it was therefore useless for him to deny; if he persisted in his denial, the punishment provided by law might be inflicted on him, without subjecting him to torture. At the time the Ordinance of Charles was promulgated, the Criminal Court was still composed of a magistrate assisted by assessors; but even this Ordinance enjoined recourse, in doubtful cases, to the opinion of men learned in the law. Starting from the seventeenth century the system of assessors fell more and more into disuse, and by the end of the eighteenth and commencement of the nineteenth century the judicial charges were almost entirely in the hands of jurisconsults, and the representatives of the non-judicial element were systematically removed; only here and there assessors were retained, principally as special courts for trying forest and rural offences.

The exact practical results of the change of procedure which came about in the seventeenth century may be seen in the treatise of the famous jurist Carpzow (1635), under the title of *Practica nova imperialis Saxonica rerum criminalium.* He recognizes the right of private persons to institute the penal action, but states that from his time public prosecutions are far more frequent. The procedure, according to him, was divided into two parts: the *inquisitio generalis*, including all the preliminary investigations made with a view to establish the existence of the offence, and fix the presumption on a particular person; and the *inquisitio specialis*, that is, the charge in regular form against the presumed author of the punishable act. This commenced with the examination of the accused, who was called upon to answer the different heads of the accusation; then followed the production of the full charges, the hearing of witnesses, and the judgment. The judge could base his decision on the *evidentia facti*, resulting from the *flagrans delictum*, or the combination of certain proofs, on the confession of the accused, or on the *convictio rei*, which was arrived at on the concurrent testimony of two respectable witnesses. However strong the proofs were, they did not suffice for condemnation, but if they were conclusive, they justified the employment of torture. If the proofs were considered insufficient to justify the application of torture, but there nevertheless existed strong presumptions, the accused was invited to take the purgatory oath. These rules became the common law

cised by the Mirrors of Saxony and Suabia, extended to the whole of Germany, and lasted up to modern times. The Ordinance of Bamberg was drawn up in 1507, and served as a basis for the great criminal Ordinance of Charles V, and of the Holy Roman Empire, generally known by the name of *Constitutio Criminalis Carolina*, which was promulgated as a law of the Empire in 1532.

of Germany, but they afterwards underwent some modifications; the procedure being divided into three parts, the information, the preliminary inquiry (*untersuchung*), and the special trial (*spezial inquisition*). The adoption of the inquisitorial system rendered the procedure written and secret, and led to the theory of legal proofs and the frequent employment of torture; the proofs had henceforward a sort of mathematical value determined by the law; the judgment was passed on the record, without oral debate and without publicity. Not only doctrine and practice, but positive legislation also contributed to hasten this transformation.

But during the course of the eighteenth century, German jurists returned to diametrically opposite opinions; after having borrowed the ideas of the Roman and canon laws, they repudiated them as a foreign importation, and sought to renew the chain of the traditions of ancient German law. The Protestant Universities seconded them in this task, and combated with the greatest energy the law which had issued from the practices of the Church; while the philosophers lent them the aid of their talent and their authority, and united with them to suppress in the name of humanity and justice a procedure which enormously favoured the prosecution at the expense of the accused, and which often left to an innocent person no means of defence. The first victory of these efforts was the abolition of torture. It was some time, however, before this reform became general. By an order of the Cabinet of June 3, 1740, the Prussian Government had restricted the employment of torture to the crimes of treason and to grave cases of assassination; the Courts, on their side, showed such an ever-increasing repugnance to recur to it, that it ceased to be used at the close of the eighteenth century, though it was only formally abolished by the Code of 1805. Austria had preceded Prussia in this matter, Maria Theresa having, on June 2, 1776, forbidden the application of torture to accused persons. An analogous step had been taken at Baden in 1767, and the example had been followed by Mecklenburg in 1769, and by Saxony in 1770. On the other hand, torture was retained in Bavaria and Würtemberg up to 1806, in the Duchy of Weimar up to 1817, in Hanover up to 1822, and in the Duchy of Gotha up to 1828.

The principles of the German common law again asserted themselves in the Austrian Penal Code of 1803, the Prussian Criminal Code of 1805, and the Bavarian Penal Code of 1813. But traces of the Roman influence remained. The Prussian Code retained the official prosecution and the secret inquiry. The project of the Bavarian Code had been prepared by the illustrious jurist Paul Anselm de Feuerbach; by this the procedure remained inquisitorial

and secret, but the accused was allowed a defender[1] in heinous cases. Feuerbach had wished to make the trial public, but could not make his opinion prevail. When the proof was insufficient, but the presumption of guilt was not rebutted, the judge simply pronounced a provisional discharge (*entbindung von der instanz—absolutio ab instantia*), that is, the accused was liable to be retried, if further proof were forthcoming, and meanwhile he would be placed under police surveillance. Many other States followed the principles of the above codes; the dangers of the secret procedure were acknowledged, and common sense revolted against the absurdity of so-called legal proofs, which often forced the judge to condemn against his own conviction. The legislation, which was the issue of the French Revolution, had inaugurated a system of procedure more consonant with the dictates of reason and equity. This system, founded on the separation of the functions of judge and accuser, on the orality and publicity of the trial, on the substitution of conscientious conviction for legal evidence, and on the institution of the jury for the trial of grave offences, would have speedily spread itself over the whole of Europe, but the hatreds aroused by the wars of the Republic and the Empire and the fear of favouring French influence retarded its introduction into Germany. Only the countries on the left bank of the Rhine enjoyed the benefits of the new system early, thanks to the French Code of Criminal Procedure of 1808, which was extended to them.

The first Code in which a tendency to approach French ideas is manifested, is the Würtemberg Code of June 22, 1843, which, though it retained the secret procedure, required that the judgment should be preceded by a public trial in all heinous cases. This tendency is more strongly marked in the Bavarian Code of March 6, 1845, and is due to the works of the jurist Mittermaier. The procedure is divided into two parts, the preliminary inquiry, which continues to remain secret, and the trial, which becomes oral and public, and which takes a preponderating place. The theory of legal evidence is done away with, but trial by jury is not admitted. A good many States, however, adhered to the common law. Then came the Revolution of 1848, which exercised a decisive influence on German criminal procedure. The Assembly of Frankfort declared the inviolability of the person and the domicile, the secrecy of private correspondence, the orality and publicity of criminal trials; press offences were to be tried by jury; no one could be withdrawn from the jurisdiction of the ordinary courts, and exceptional tribunals were forbidden. A majority of States revised

[1] All the defender could do was to draw up a written defence.

their laws of criminal procedure in accordance with these principles; for instance, Prussia by an Ordinance of January 3, 1849, Austria by the Code of January 17, 1850, and Bavaria by the Law of November 10, 1848.

But a reaction speedily set in, resulting in the enactment of some manifestly retrograde laws. For instance, in Austria, the Code of 1850 was replaced by the Code of July 29, 1853, which restricted the publicity of the trial, and returned in some respects to the system of legal evidence, by determining the minimum of evidence necessary for a conviction. Henceforward, two opposing tendencies were seen both in doctrine and legislation, the one favourable to French ideas and the changes made since 1848, the other favouring a return to the former procedure. However, the old state of things had received a definite condemnation, and liberal theories, after undergoing divers vicissitudes, finally triumphed almost universally. While the Code of 1877 had to suppress many local divergencies, it took as its basis those principles which were admitted in the large majority of States; namely, a private accuser, oral and public trial, and the admission of the non-judicial element, a jury for crimes, and assessors for smaller offences. One may say, then, that the Code of 1877 only consecrated juridical rules already in force in the greater part of the empire.

To sum up, criminal procedure in Germany, as in most European continental States, has undergone three successive phases. At first, it is purely *accusatory*: that is, a complaint by the victim or his relatives is necessary. The Court is composed of all the freemen of the tribe, or of a certain number of delegates, and the trial is public. The accused establishes his innocence by getting his relatives or friends to solemnly confirm his declarations, or by the judicial duel or by ordeals. At the end of the middle ages, and under the influence of the Roman law and of the canon law, the procedure becomes *inquisitorial.* The judge takes cognizance *ex officio* on a charge, on a private complaint, or simply on his own suspicion. The inquiry and examination of the accused are secret, and everything is committed to writing. The proof consists of the confession or the depositions of witnesses; the confession especially is regarded as of the last importance, and in order to extort it from the accused, resort is had to violence. The law lays down in what circumstances the judge must hold the guilt to be proved. Judgment is delivered on the written record, without any open trial, arguments, or publicity. Then came what may be called a mixed procedure. Under this new system the starting-point of every criminal trial is a prosecution generally set in motion by a special functionary, representing society. The preliminary inquiry is conducted with

closed doors, but the trial is public. The theory of legal evidence is finally abandoned, torture is abolished, and the judge, in the exercise of his duties, has only to act on his conscience.

The Code of Criminal Procedure.

Article 4, clause 13 of the Constitution of the Confederation of Northern Germany mentions penal law and procedure among those subjects in which it was desirable to have uniform laws for all the Confederated States. The Penal Code was promulgated on May 31, 1870, but the varying judicial organizations of the different States put obstacles in the way of passing a Criminal Procedure Code, which, with the Code of Civil Procedure, had to go hand in hand with the Code of Judicial Organization.

It will be convenient to give an outline of the principles of penal procedure which have been embodied in the Code, before proceeding to discuss its provisions in more detail.

Cognizance of Offences and Initiation of Proceedings.

The Code reserves to the representatives of the social power an almost absolute monopoly of accusation. It is only as an exception that the victim is allowed to cite the author of the wrong before the Criminal Court, and this power is accorded only in the case of defamation, slight bodily hurt, or hurt caused by rashness or negligence (art. 414); with the exception of these few cases, he can only go to the Civil Court for damages, or move the Prosecution Department to institute the public action. In order to obviate any danger or inconvenience which might arise from the want of independence or the political opinions of the Public Prosecutor, the party aggrieved can, in the case of refusal, apply to the Prosecutor's Departmental Superior, and if the application be rejected, he can appeal to the Superior District Court or to the Court of the Empire, which can direct proceedings to be taken against the accused. There is, however, one restriction on the initiative of the Prosecution Department, and that is that certain offences (*antragsdelikte*), which are considered to harm private interests principally, or to attack the honour of persons or families, can only be prosecuted on the complaint of the person aggrieved or his legal representatives. The penal action and civil action have no common bond. The power given in France to the injured person to make himself a civil party in the criminal court, is not admitted at all. All claims for damages, based on a crime, a delict or a contravention, must be made in the civil courts. Each jurisdiction thus preserves its independence and its distinct attribute.

Although private persons have only in exceptional cases the right to institute a prosecution in the criminal court, they are often permitted to join in the case, when it has been taken up by the Public Prosecutor. Such intervention is permitted both to those who have the right of private action, and also to complainants who, on the refusal of the Prosecution Department to act, have obtained from the Court an order for inquiry, provided that the offence has been directed against their life, health, civil status, or property (art. 435). It has been considered with reason that the Public Prosecutor, forced to proceed against his will, would not display sufficient zeal, and the intervention of the complainant is permitted to supplement this insufficiency, and prevent any collusion. Moreover, the party aggrieved can join in the public prosecution when the law accords to him the right of claiming a pecuniary compensation (*Busse*).

When once the inquiry has been started, the Public Prosecutor is not permitted to abandon the accusation. He can of course, if the proceedings appear to him to be ill-founded, advise the withdrawal of the prosecution, but it is no longer in his power to stop the penal proceedings (art. 154); whereas the private accuser can withdraw at any moment before judgment is pronounced, and thereby put an end to the prosecution (art. 431).

The Criminal Courts, then, take cognizance of offences either at the instance of the private complainant or of the Public Prosecutor. The charge must be laid in the Village Court, if the offence is within its jurisdiction; otherwise, in the District Court. The first duty of the Court is to see if it is competent, and if not, it sends the record to the proper Court. When the question of jurisdiction has been decided, the Court either proceeds at once to the trial, or, if it thinks necessary, directs a preliminary investigation. No such investigation takes place in cases which are within the competence of the *Village* Courts of assessors; but it is compulsory in cases which must go to the Courts of Assize or the Court of the Empire. As regards offences triable by the District Courts, a judicial inquiry can be ordered at the instance of the Public Prosecutor or on the demand of the accused when based on good grounds (art. 176). For the rest, the Court can always, of its own motion, direct an investigation or a search for certain special evidence. The object of the investigation is to place the Court in a position to see if there are sufficient grounds for continuing the prosecution. The magistrate in charge of the investigation must be equally solicitous in ascertaining facts in favour of the suspected person as in getting evidence of the offence. Thus the accused has a full opportunity of clearing himself, and so of avoiding a public trial.

With a view to ensure the impartiality of the magistrate in the preliminary investigation, its publicity and orality is permitted to a certain extent; the accuser and accused are confronted, and make remarks on the charges, the evidence, and the statements of the witnesses. M. Daguin observes that such a system has many drawbacks: 'Under the pretext of safeguarding the rights of the defence, it disregards the interests of society in having the criminal brought to justice. A moment's reflection is sufficient to show how important it is to proceed at first in secret and without noise, if one wishes to reach the author of a crime, to get at his accomplices or seize the proofs of the offence; to act openly in the light of day is to give a warning to the criminal and his accomplices, to facilitate their flight, and allow them to cause evidence of the offence to disappear. The hearing of witnesses in the presence of the accused and his defender is no less injurious to the discovery of the truth; for even supposing that the witnesses are not disconcerted and confused by the insidious questions of the defender, it is impossible to deny that the presence of the individual against whom they have to depose must be for many of them a cause of intimidation, and must detract from the sincerity of their statements.' The investigating magistrate is given very full powers; he can question the suspected persons, arrest or detain them, visit the spot, make domiciliary visits and seizures, hear witnesses, or direct expert operations. It was considered that the best way of preventing any abuse of these powers was to allow the accused the assistance of a defender capable of explaining his rights to him, and putting him on his guard against any snares laid for him, and art. 137 of the Code allows the accused to employ a defender from the commencement of the investigation; it even permits the investigating officer to appoint a defender, if the accused fails to choose one himself (art. 142). However, the defender, during the preliminary procedure, has only a very subordinate part to play; that is, he is confined to helping his client with his advice, and can neither assist in his examination nor in that of the witnesses. The Public Prosecutor is equally excluded from these operations. The defender can be present when places are visited, and can inform himself regarding the examination of the accused, the reports of experts, and the contents of the record generally; but he is not ordinarily, like the Public Prosecutor, allowed to inspect the record. When the accused is under detention pending trial, he is permitted to communicate with his defender either orally or by writing; but any written notes exchanged must be submitted to the investigating magistrate, and an official of the judicial service must be present at the

interviews. This last restriction on free communication is dispensed with, when the under-trial detention has been ordered only owing to the fear that the accused may take flight[1].

Preventive Detention.

Although the accused is considered as innocent until he is actually convicted, the necessity of securing his person, either to prevent his absconding, or to prevent his tampering with the witnesses, is admitted. But the rigours of such detention must be softened as much as possible. To justify preventive detention, the German Code requires the existence of grave presumptions against the accused, and a reasonable belief either that he may take flight or that he may abuse his liberty in order to cause evidence of the offence to disappear or to threaten or persuade the witnesses to make false statements. The law conclusively presumes an intention to abscond, when the act charged is a crime, when the accused is living in a state of vagabondage, without fixed domicile or unable to justify his identity, or when he has his domicile abroad and there is reason to believe that he will refuse to obey process (art. 112). If the offence is less serious, and punishable only with simple imprisonment or fine, arrest and detention can only be ordered to prevent flight, and that only if the accused is in one of the above conditions (art. 113). The German law is in two respects less favourable to the accused than the French law; firstly, it permits arrest in certain cases when the act is a simple contravention punishable with fine only; secondly, it imposes no limit on the duration of the preventive detention[2].

The general rule is that no person can be arrested or kept in detention except by order of a judge[3] (arts. 114 and 125). But any person may arrest in the case of an offence committed in his view; and in other cases officers of police and public security may arrest when there is danger in a dwelling (art. 127). The person arrested must be forthwith taken, according to circumstances, before the investigating Magistrate, the President of the Village Court, or before the Court itself, by whom he is interrogated at the latest on the day following that on which he is brought up, and by whom he can be set at liberty, if there are grounds for doing so (arts. 125 and 129). Persons under preventive detention must be treated with certain consideration. They are to be kept

[1] See *infra*.
[2] Cf. the French Code of Criminal Procedure, arts. 94 and 113.
[3] This term includes magistrate, and the *juge d'instruction*. The President of even the lowest court is called a judge in Germany. Both judge and magistrate are generic terms, and, if anything, magistrate is a higher term than judge.

as far as possible in a separate part of the prison, and are subjected to prison discipline only so far as is necessary for the maintenance of good order and their safe custody. They can also provide themselves at their own expense with commodities and occupations suitable to their situation and personal resources (art. 116). He can maintain connection with the outer world, when this is not forbidden by the *juge d'instruction*; and in all cases he may communicate freely with his defender.

Domiciliary Visits and Seizures.

Art. 123 of the Penal Code sanctions the inviolability of the domicile; but the judicial authority is not affected by this provision. Not only may houses of suspected persons be searched (art. 102), but houses of non-suspected persons also in order to arrest an accused, or to follow up the traces of an offence, or to seize certain specific objects (art. 103). With the exception of cases of flagrant delict or urgency, night visits are allowed only to arrest an escaped prisoner; but certain places, such as houses belonging to persons under police surveillance, gambling houses, and houses of ill fame, are outside the common law and can be visited at any time (art. 104).

A more important act, perhaps, than the search is the seizure, as it suspends for the time the right of property. This temporary expropriation can be applied to any object whatever, required or useful, for the purposes of the investigation (art. 94). Letters and telegrams addressed to the accused can be intercepted; also letters which there is reason to believe have come from him or to be meant for him (art. 99).

The Commencement of Proceedings.

When the preliminary investigation has been closed, the investigating magistrate sends the record to the Public Prosecutor, who transmits it to the Court. The Court then either sends the record before the competent Court, decides that there is no ground to proceed, or suspends the proceedings[1] in the case, according to circumstances (art. 196). Where there has been no preliminary investigation, such decision is come to after the lodging of the charge (art. 197). The *juge d'instruction* is not permitted to sit in the cases which he has investigated. The sending of the record to the competent Court is the crowning act of the preliminary procedure. After that commences the principal procedure (*Hauptverhandlung*). The witnesses and experts are again examined even

[1] This is done when the accused is absent or is of unsound mind.

when they have been examined at the preliminary investigation; but their depositions can be read at the trial if they have died, become of unsound mind, have disappeared, or are unable to appear (art. 250).

The Trial.

The accused is allowed a defender; and if he fails to appoint one, the Court appoints one for him in all cases which are triable by the Court of the Empire or the Court of Assize. Such appointment is obligatory in all cases, if the accused is deaf or dumb or under sixteen. The German Code shows greater consideration than the French Code for the rights of the defence. The judgment by default or contumacy is only allowed in very exceptional cases. The trial cannot commence in the absence of the accused except in the case of offences punishable with fine, simple imprisonment, or confiscation (arts. 229 and 231). But if the accused once appears, and absconds after his examination, the trial can be continued in spite of his absence, when the Court is of opinion that his presence is not indispensable (art. 230). The judgment by default can also be pronounced when the presence of the accused has been dispensed with at his request by reason of the distance of his residence; but the Court is not allowed to accord such permission, unless it is certain beforehand that the punishment to be inflicted will not exceed six weeks' imprisonment, fine, or confiscation (art. 232). If the accused has no known domicile in Germany, or if he resides abroad, and it appears impossible or inconvenient to make him appear, he is regarded as absent, and the trial can be opened provided the offence is punishable with fine only or confiscation (arts. 318 and 319). When proceedings are suspended owing to the absence of an accused, all steps may be taken to procure evidence and keep it intact, and all his property may be attached. An accused who is convicted in his absence may claim a retrial, if he can prove that a *vis major* or unforeseen circumstances and insurmountable difficulties prevented his obeying the summons (arts. 234 and 44). It is the opinion of jurists that the German legislator has gone too far in sacrificing the interests of the prosecution to those of the defence; and that the power to attach property is not of much use, as few criminals have any property to speak of. The disappearance of the accused, though not necessarily a proof, is at least in a majority of cases strong presumptive evidence of guilt. The criminal who escapes punishment by flight has only to allow the period of limitation to elapse, and then can return to Germany with a bold face, and has not even to suffer the disgrace resulting from a conviction, a disgrace which, in countries where the

judgment by default is admitted, is some sort of substitute for the punishment itself. Such a result is as injurious to morality as it is compromising to public security.

In jury trials, a majority of two-thirds is necessary for the conviction of an accused (art. 262). In cases before the Court of Assize, eight out of twelve jurors must agree (art. 307); but, as regards the refusal to admit extenuating circumstances, seven jurors must agree; that is, if the numbers are equal, the benefit of such circumstances is given to the accused (art. 277). After the arguments are over, the President points out to the jury the points of law which they have to take into consideration in the accomplishment of their task, but he is not allowed to discuss the facts or the value of the evidence (art. 300); nor can he call their attention to the arguments put forward by the prosecution and the defence. The jury return their votes or verdicts on certain questions put to them, and the Court (not the President only, as in France) pronounces acquittal or conviction (art. 314).

The Appeal.

During the debates on the Code the question whether there should be any appeal against criminal decisions was keenly debated. The original draft decided the point in the negative. It was urged that the appeal, at least as regards the question of culpability, was quite incompatible with the principle of the oral nature of the trial; the judge forms his conviction on what he hears and sees at the trial; the demeanour, the attitude, the facial expression of the witnesses are all facts which influence his opinion and determine him to attach more or less credence to their statements. A mere record is powerless to fix these impressions and undefinable *nuances*. But it is on the record only that the appellate Courts decide. It is true that they have the power to recall and hear the witnesses for themselves, but after a lapse of time the witnesses can compose their demeanour and assume an attitude quite different from that which they had displayed in the first instance. Moreover, although the appellate judges may be more learned in law, it cannot for a moment be admitted that they are better judges of facts than the lower courts. These were the considerations which determined the Austrian Legislature in 1873 to leave questions of fact entirely to the judges of first instance, allowing an appeal only on questions of law[1]. More radical, the German Government proposed to suppress the appeal altogether. The Commission of the Reichstag at first rejected the proposal, but

[1] Austrian Code of Criminal Procedure, arts. 283, 345, 464.

ultimately advocated a mixed system, which has been adopted in the Code. This system is based on a distinction between judgments of District Courts and Courts of Assize, on the one hand, and the decisions of the Courts of Assessors on the other, only the latter being made appealable. It would have been more logical to disallow the appeal altogether, but the reasons given for allowing an appeal from the decisions of the Village Courts of assessors were that they were not preceded by any preliminary inquiry, that certain restrictions could be placed on the production of evidence for the defence, and that only one of the judges composing them had any juridical knowledge.

Revision.

The *revision* corresponds to the French *pourvoi en cassation*, is applicable only to the decisions of Courts of Assize and District Courts, and can only be based on a violation of law (art. 376). For the rest, the powers of the German Courts of Revision are much more extensive than those of the French Court of Cassation; for the latter can never finally decide a case, but, after quashing a judgment, must send the case back again for rehearing, whereas the German Courts can in some cases decide the matter finally themselves, and are not bound to send it back.

The review is not properly a mode of revision, as it can be ordered only in respect of those judgments which have become final, and the application is made to the Court which has decided the case. This means of relief has for its object to upset decisions which have become unassailable, and to cause the proceedings to commence afresh, either because new evidence or facts have been discovered since the judgment, or because the first decision has been rendered under circumstances which radically vitiate it, or finally because certain documents or exhibits produced at the trial have been proved to be false or falsified. The review can take place either for the benefit of the convicted person (art. 399) or to his prejudice (art. 402). It can be claimed, not only by the convicted person, but even after his decease by certain relatives, in order to rehabilitate his memory (art. 401). It corresponds to the revision of the French criminal law [1], though it is exercised over a much wider field.

Exceptional Jurisdiction or Procedure.

The general rules of procedure in the Code are common to all jurisdictions. However, there are some exceptions. In the Village

[1] French Code of Criminal Procedure, art. 443 seqq.

Courts a prompt and summary procedure is in force for the decision of contraventions and offences of slight importance. It is very similar to the procedure in the Austrian Code of 1873, known as 'summary procedure' (*Mandatsverfahren*). The judge of the bailiwick, on the written requisition of the Public Prosecutor, passes sentence without the aid of assessors, and without any preliminary trial (art. 447). This procedure has distinct advantages for the accused, as it obviates loss of time, expense, and the harassment of a public trial. It is only resorted to in comparatively petty cases, as the punishment which can be inflicted in this way must not exceed a fine of 150 marks, simple imprisonment for six weeks and confiscation. Moreover, it is generally adopted when the facts are clear and well established by the report (*protokoll—procès verbaux*). If the accused thinks he has cause to complain of the sentence, he can oppose it within a week of its intimation to him (art. 449), and it then comes before the Court of Assessors regularly constituted and proceeding in conformity with the ordinary rules.

Among the other exceptional procedures admitted by the Code, there are two which deserve notice, as an administrative functionary takes the place of the Court. The first is employed in the matter of contraventions, the second in dealing with infringements of the fiscal laws. Certain contraventions can, by the particular legislation of the different States of the Empire, be made over to the administrative or municipal police authorities and punished by a simple penal order, provided the punishment does not exceed fourteen days' simple imprisonment, fine, or confiscation (art. 453)[1]. Similarly administrative authorities may punish breaches of the laws relating to taxes and public contributions, provided the punishment be fine or confiscation[2] only (art. 459). In both cases the convicted person can either appeal to the superior police or administrative authority, or, if he prefer it, can claim to be tried by the ordinary Court, that is, the Court of Assessors or the District Court. These exceptional modes of procedure are doubly advantageous, saving time and considerably reducing the costs; while as to the accused, he is amply protected against arbitrary conviction by the dual recourse allowed to him, administrative or judicial.

This brief sketch of the principal provisions of the Code will give an idea of the German criminal procedure of to-day. The Code has many points in common with the French Code of Criminal

[1] The amount of punishment differs in different States. Some States exclude contraventions of a graver nature. In Baden and three other States contraventions of the Railway Law can be administratively tried and fined by the railway authorities.

[2] In India, Forest Officers may compound offences against the Forest Act by imposing a penalty, and the Collector may, instead of prosecuting, impose penalties for infringements of the Stamp Law.

Procedure, but it is more scientific in its method and more logical in its arrangement. It is also more liberal, and pays more consideration to the interests of the accused. It deserves to be studied by all judges who administer criminal law, and also by the legislators of those countries which are engaged in the reform of their criminal procedure.

H. A. D. PHILLIPS.

MODERN LEGISLATION IN THE UNITED KINGDOM.

THE mantle of the Roman Praetors seems of late years to have fallen upon our Imperial Legislators. Since 'Equity crystallized under Lord Eldon,' Acts of Parliament are the only means of 'assisting, supplementing, or correcting the ordinary law' of the land.

The Legislature is, however, at a disadvantage in one respect. The Praetor not only promulgated new law in his Edict, but he presided in the law court and explained and administered the law he had thus introduced. In the United Kingdom Parliament makes the laws, but (except to a moderate extent when the House of Lords sits as a final court of appeal) the duty of interpretation is cast upon a body of men widely different. The laws are made by men, the majority of whom have no knowledge, either by education or experience, of the legal meaning and effect of the rules they lay down; and, in many cases, the statutes require a considerable amount of judicial exposition before the so-called 'intention' of the Legislature can be definitely ascertained. In interpreting the law of England, the Judges of the Supreme Court are progressing or retrogressing more and more to the position taken up by the Common Law Judges whose duty it was, some 600 years ago, to construe the Statute of Westminster the Second and the writs issued under that statute *in consimili casu*; and, almost invariably, it is not the spirit, but the strict letter—the actual literal meaning of the words—that forms the basis of a modern decision upon an Act of Parliament. No doubt a judge's duty is to expound laws and not make them, but there are occasions on which the application of this principle has been pushed beyond its extreme limits. The celebrated jurist and former judge, Sir James Fitz-James Stephen, in an article on 'Gambling and the Law' in the *Nineteenth Century* for July 1891, called attention to a striking instance of this kind in the decision of the Court of Appeal in the case of *Read* v. *Anderson* (L. R. 13 Q. B. Div. 779), the result of which was that the Gaming Act 1845 became a dead letter whenever the bet was made by an agent in his own name on behalf of his principal. A judicial interpretation of this kind could never have been contemplated by the framers of that statute, and the Gaming Act of 1892, which virtually overrules *Read* v. *Anderson*, has probably diminished

considerably the number of agency transactions of this nature. The Conveyancing and Law of Property Act 1892 is another example of the remedial action of the Legislature in correcting narrow interpretations of a former statute. Misinterpretations by the judges, of language which appears to bear a clearly different meaning to other intelligent men, are, however, few and far between; and the growing necessity for the judicial construction of recent statutes may more properly be ascribed, not to a tendency on the part of the judges to draw fine distinctions, but to the ambiguous wording of the statutes themselves. The case-law of England is certainly increasing, in bulk at all events, at a much more rapid rate than the statute-law. Of the eight volumes of Law Reports issued annually by the Incorporated Council of Law Reporting for England and Wales, one alone is sufficient to contain all the Acts of Parliament of the year, public, local, and private; the remaining seven consist entirely of reported cases. A glance at the 'Current Index' will show how many of these cases are concerned with the interpretation of a statute or statutes, the proportion for the year 1892 (not including decisions on statutory rules) being nearly 40 per cent., most of them relating to statutes passed within the previous twelve years.

It would seem therefore of the utmost importance that all bills should be carefully drafted and settled by competent authorities before they become law; but this is precisely the fate which rarely, if ever, attends a great number of them.

The Government bills are the most fortunate, being, as a rule, drafted in the office of the Parliamentary Counsel, or of his assistant; and if the head of a public department, such as the Board of Trade or Local Government Board, is in charge of a bill, the clerks of the department also bestow some of their divided attention upon it. During the progress of important bills the services of the Parliamentary Counsel are in great and constant demand; but neither he nor his learned assistant is omniscient or infallible. The public bills introduced by private members fare very much worse. Apart from the scant attention which is their lot, owing to the demands made on the time of the House of Commons by the Government of the day, they are maimed at their birth, as it were, by being drafted by incompetent hands. Unfortunately, in spite of their many adversities, some of them happen to pass—usually with deplorable results. The Married Women's Property Act 1882 was a private member's bill. It may be cited as an 'awful example.' There is not a single section, hardly a single phrase of the Act, indeed, which has not required judicial interpretation.

Even the Government bills have a sufficiently tempestuous career. Leaving out of consideration bills purely political—i.e. introduced by the Government as a reward for the past, or a bribe for the future, votes of a section or sections of the electorate—which are generally considered by a committee of the whole House, Government bills after they have passed their second reading, are, as a rule, referred either to a special committee of members more or less acquainted with the branch of law on which they touch, or to one of the Grand Committees. It is another anomaly that one of the Grand Committees should have for the subject from which it takes its name of the 'Grand Committee on *Law*,' the one which ought to concern them all.

From the Committee and Report stages, the most carefully drafted bills often emerge greatly impaired by the addition of amendments accepted in a hurry for the sake of appeasing some particularly hostile opposition.

The final result is that our modern legislation presents a number of defects which may be considered under the following heads as exemplified in the Acts themselves:—

(*a*) Incompleteness;
(*b*) Obscurity;
(*c*) Want of Uniformity, and Interdependence.

These divisions, although they occasionally overlap, are sufficiently distinct to be worthy of separate consideration.

In reference to the incompleteness of modern Acts of Parliament, it must be admitted at the outset, that it is absolutely impossible to provide for all future conditions of society or to guard against every expedient by which an ingenious lawyer may drive a metaphorical 'coach-and-four' through an Act of Parliament. Nevertheless by a consideration of the statutes passed in very recent years, it is evident that the haste with which they have been hurried through Parliament, or the lack of sufficient knowledge on the part of their sponsors or draftsmen, has caused an incompleteness which might have been avoided and which has required to be speedily remedied.

Thus, a statute dealing with mortmain and charitable uses has been passed in each of the years 1888, 1891, and 1892; that of 1888 having for its object the codification of the then existing law on the subject. The Foreign Marriage Act 1892 has repealed and substantially re-enacted with amendments the Marriage Act 1890, and the Foreign Marriage Act 1891. The Friendly Societies Act 1888 (which amended section 30 of the Friendly Societies Act 1875) was repealed and re-enacted with a small but material alteration by the Friendly Societies Act 1889. The Lunacy Act

1891 amended the Lunacy Act 1890; the Bills of Sale Act 1891 amended the Bills of Sale Act 1890; and the Forged Transfers Act 1892 amended the Forged Transfers Act of 1891. Even in the past phenomenal year of grace, 1893, time was found for 'An Act to amend the Public Libraries Act 1892'—56 Vict. c. 11—passed June 9, 1893. Nor is this state of things by any means a recent evil. It was commented upon upwards of twenty years ago by the editors of the English edition of M. Ortolan's *Histoire de la Legislation Romaine*, who, at page xviii of their Translator's Introduction, remarked as follows:—

'At the present moment our legislature is in the habit, as circumstances may require, of issuing Acts of Parliament. These are, in fact, means of amending, abrogating or supplementing existing law. The great defect of the present system is that, instead of withdrawing, upon each occasion when alteration is found necessary, the existing law upon any given subject, that which exists is allowed to remain; generally, however, it is mutilated, and a new Act is promulgated introducing certain changes. The result is that, in order to ascertain the actual law upon the point under consideration, it is necessary to refer to a variety of Acts, and much unnecessary labour and expense and the risk of uncertainty and inaccuracy is the consequence. All these difficulties might be obviated and the obscurity removed if whenever any alteration was required in a portion of a statute, the whole statute was repealed and a new Act introduced, reproducing those portions which required no amendment and containing the modified or the new clauses in their proper place.'

The remedy thus suggested would obviously be often too drastic. Four-fifths of the Conveyancing and Law of Property Act 1892, for example, consist of amendments of subsection 6 of section 14 of the Conveyancing and Law of Property Act of 1881; and it would, it is submitted, be a waste of energy to repeal the whole 73 sections of the Act of 1881, for the purpose of amending one subsection of a section. The Legislature might, however, have adopted the plan of repealing subsection 6 instead of patching it up in this cumbrous fashion by means of sections and subsections. Moreover, in each of the cases of the Bills of Sale Act 1891 and the Forged Transfers Act 1892, it would, since the Acts requiring amendment were so short, have been a distinct advantage to follow the principle of repeal and re-enactment carried out in some of the instances previously mentioned.

Secondly: as to the charge of obscurity.

The best proof, perhaps, of the existence of this defect may be obtained by referring to the second section of the Forged Transfers Act 1892, which runs as follows:—

'Whereas, by subsection 1 of section 1 of the Forged Transfers Act 1891, it is provided that such company or local authority as therein mentioned "shall have power to make compensation by a cash payment out of their funds for any loss arising from the transfer of any such shares, stock, or securities, in pursuance of a forged transfer, or of a transfer under a forged power of attorney," and it is expedient to remove doubts as to the application of the Act to losses and forgeries before the passing of the Act.'

Other examples may be found in the Married Women's Property Act 1882, already referred to, and in the Bills of Sale 1878 Amendment Act 1882. Of the latter Act, for example, in the *Wimbledon Local Board* case (57 L. T. (N. S.) 55, 1892) Mr. Justice Day, speaking of section 14, said:

'The section is no doubt very inconveniently and awkwardly framed, and obviously does not express what the Legislature intended to say.'

Thirdly: as to the want of uniformity.

A modern improvement in Acts of Parliament is the introduction of a section or sections giving a short title by which the Act may be cited, and explaining to some extent the construction of the Act by stating that it is to be read and construed as one with some Act or Acts previously passed, affecting the same branch of law. Sometimes these explanatory sections appear at the commencement of the Act, sometimes toward the end: occasionally one set of words, at other times a different set of words, is used to express the same mode of citation or construction. Thus in 1890, three statutes were passed relating to public companies. These Acts, which form consecutive chapters on the roll of statutes and received the Royal Assent on the same date—August 18, 1890—show a want of uniformity in this respect.

In the Companies (Memorandum of Association) Act 1890, 53 & 54 Vict. c. 62, the sections which are at the end of the Act read as follow:—

'3. (1) This Act may be cited as . . . &c.

'(2) This Act and the Companies Acts 1862 to 1886 shall be construed as one Act, and may be cited collectively as the Companies Acts 1862 to 1890.'

In the Companies (Winding Up) Act 1890, 53 & 54 Vict. c. 63, the sections also appear at the end of the Act and are as follow:—

'35. (1) This Act may be cited . . . &c.

'(2) This Act and the Companies Acts 1862 to 1886 may be cited together as the Companies Acts 1862 to 1890.'

Lastly, in the Directors' Liability Act 1890, 53 & 54 Vict. c. 64, the sections appear at the commencement of the Act and are as follow:—

'(1) This Act may be cited as . . . &c.

'(2) This Act shall be construed as one with the Companies Acts 1862 to 1890.'

Again, during 1892, a most useful bill became law as the Short Titles Act. It provides alternative modes of citation in respect of many Acts of Parliament. It will, for example, be correct for the future to allude to the famous statute of William and Mary as the 'Bill of Rights.'

The Short Titles Act also provides a short mode of citation for various groups of Acts, but in setting out the various Acts which may be cited as the 'Companies Acts 1862 to 1890,' the draftsman has omitted the Directors' Liability Act 1890 while including the two other Companies Acts of that year.

Fourthly: as to the interdependence of the statutes. This is probably to the practising lawyer the most exasperating defect of all.

Recent examples are again sufficiently numerous. Thus the Stamp Act 1891 is by its longer title expressed to be 'An Act to consolidate the enactments granting and relating to the Stamp duties upon instruments, and certain other enactments relating to Stamp duties.'

Previous to the passing of this Act, the bulk of the law relating to stamp duties was contained in the Stamp Act 1870. The latter Act is almost totally repealed by the Stamp Act 1891; not altogether, however, sections 25 (3), 27, and 28, of the Act of 1870 are expressly left unrepealed. In spite of the alleged codification, it is therefore necessary for the practitioner to remember that the Stamp Act 1891, and the Stamp Duties Management Act 1891 do not form a complete code on stamps and stamp duties, but that in respect of one or two minor matters he must refer to the Stamp Act 1870.

The Housing of the Working Classes Act 1890 is another instance. This Act was passed to amend the short Act of 1885, which bears a similar title, and to incorporate some earlier Acts. The draftsman of the Act of 1890 is to be commended for the manner in which he has included in the Act (sec. 75) a provision (sec. 12) of the Act of 1885, which is repealed and thus re-enacted by the Act of 1890. By the use in the latter Act of the words, 'In any contract made after the fourteenth day of August 1885'—the date of the 1885 Act—this repealed provision of the 1885 Act is kept alive from the

moment of its birth as it were. Why then, with this excellent mode of repealing and re-enacting present in his mind, did the draftsman of the 1890 Act leave unrepealed five sections of the Act of 1885? The Housing of the Working Classes Act 1890 is also illustrative of another phase of interdependence. A house for the working classes is, in the above-mentioned section 75 of the Act, described as 'A house or part of a house at a rent not exceeding in England the sum named as the limit for the composition of rates by section 3 of the Poor Rate Assessment and Collection Rate 1869, and in Scotland or Ireland four pounds.' And it becomes necessary to refer to the last named Act for these particulars, which fix certain rents for certain of the cities of England therein named, and a rent of £8 for houses in any other part of England. It is hardly an excuse that in this matter the draftsman was repeating the exact wording of the Act of 1885.

Similarly, the Law of Distress Amendment Act of 1888 refers for a description of goods thereafter exempt from distress to section 96 of the County Courts Act 1846, 'or any enactment amending or substituted for the same'; and curiously enough, by the County Courts Act 1888, passed within the following six days, section 96 of the Act of 1846 was repealed and re-enacted.

In conclusion, it may be remarked that the illustrations of imperfect legislation which appear in the foregoing pages are taken from sessions of Parliament previous to that of 1893, and they are therefore not affected by the peculiar difficulties in the way of careful legislation during that year.

In some instances the mere mention of the defect suggests its appropriate remedy, but it should not be impossible for those who make politics their business, to devise a scheme under which the majority, if not the whole, of the existing defects might be obviated.

It is not, I think, within my province to put forward such a scheme, but one or two suggestions tending towards a possible amelioration may not be altogether out of place.

1. It is still true, as Bagehot remarked, that the House of Commons 'tries too much'; witness the annual Expiring Laws Continuance Act.

It would be better to try less and do the work thoroughly.

2. The plan of carrying forward the unfinished bills of one Parliament to the same stage in the Parliament of the following year, is one which has been found to work well with private bills, has received the approval of the Associated Chambers of Commerce (at Cardiff, September 21, 1892), and might well be applied to public bills with a sufficient safeguard, e.g. a three-fifths majority at the second reading.

3. The employment of experts, which has also worked well, as instanced in the Conveyancing Acts, might be extended.

4. Greater encouragement should be given to the conversion into statute law of the various attempts by trained lawyers to codify particular topics of law, of which attempts the Bills of Exchange Act 1882, the Partnership Act 1890, and Judge Chalmers' Sale of Goods Bill, now before Parliament, may be cited as successful examples.

5. Adopting the words of Professor A. V. Dicey in his 'Law of the Constitution,' with the reservation that in this case also safeguards would be required:—

'The substance no less than the form of the law would, it is probable, be a great deal improved if the executive government of England could, like that of France, by means of decrees, ordinances or proclamations having the force of law, work out the detailed application of the general principles embodied in the Acts of the Legislature [1].'

6. And, finally, if a much modified return were made to the ancient practice when the judges drew up the statutes at the end of the session; if all bills were retained, say, at the Report stage, until a committee, composed of the judges and of paid legal experts specially appointed, had examined them and had made such suggestions as might be necessary to obviate anomalies and carry out the apparent intention of the Legislature, we might, possibly, be a little nearer to the millennium foreshadowed so eloquently by Lord Brougham in his great speech upon 'The present state of the Law [2].'

FRANCIS E. BRADLEY.

[1] First Edition, page 49; which see, for a fuller exposition of Mr. Dicey's views.
[2] House of Commons, Feb. 7, 1828: *Speeches*: A. and C. Black, 1838, Vol. II. p. 485.

THE VAGLIANO CASE IN AUSTRALIA.

THE question under what circumstances the payee of a bill of exchange is to be deemed 'a fictitious or non-existing person' so that the bill may be treated as payable to bearer was discussed at great length in the case of the *Bank of England* v. *Vagliano*[1]. That case had special reference to forged documents purporting to be bills of exchange properly so called. The question under what circumstances the principle laid down in that case is applicable to the payee of a cheque or of a promissory note was not then under consideration, but it is one of great importance in commercial transactions. The question as relating to promissory notes is of special importance in Australia, where promissory notes are used much more frequently than bills, and in business transactions are usually spoken of as bills; and this question has recently been engaging the attention of the Supreme Court of New South Wales.

According to the decision of the House of Lords in Vagliano's case, although the person named as payee in a document purporting to be a bill, and to whose order the pretended bill is made payable on the face of it, is a real person, if he has not, and never was intended by the drawer to have, any right upon it, or arising out of it, he may be deemed to be 'a fictitious or non-existing person' within the meaning of s. 7 (3) of the Bills of Exchange Act, 1882, and the document may be treated as a bill payable to bearer. Supposing a rogue instead of drawing a false bill and forging the drawer's name, and then obtaining a real acceptance, as Glyka did in that case, induces by false pretences a responsible person to make a promissory note payable to a certain firm or order, and then obtains possession of the note: does the fact that the firm has not and never was intended by the rogue to have any right upon the note or arising out of it, make the firm 'a fictitious or non-existing person' within the meaning of the section, and the note payable to bearer? Is it material to inquire whether the firm named is a real existing firm carrying on business, or whether it has ceased to carry on business, or whether it is altogether an imaginary firm, never having had any existence in fact? Or on the other hand, does the fact that the rogue is

[1] '91, A. C. 107. [See LAW QUARTERLY REVIEW, vol. vii. p. 216.]

here no party to the instrument, and has not procured a forged bill to be accepted, but has by false pretences procured a real note to be made, render this case distinguishable from that of Vagliano?

These questions arose for decision recently in New South Wales in the case of the *City Bank* v. *Rowan & another*, which was argued and decided last March in the Supreme Court, constituted of Sir Frederick Darley, Chief Justice, Mr. Justice Innes and Mr. Justice Foster. The action was brought on a dishonoured promissory note for £574, dated December 22, 1891, made by the defendants payable to 'J. Shackell & Co. or order' four months after date, and purporting to be indorsed by J. Shackell & Co. to Jones & Co. and by the latter to the plaintiffs. The promissory note was made by the defendants under the following circumstances:—In December 1891, a man named William Shackell called on the defendants at their warehouse in Sydney, and represented that he had 150 bales of wool packs for sale on account of Messrs. James Shackell & Co., of Melbourne, and that he was related to Mr. J. Shackell of that firm; and negotiations for the sale of the bales to the defendants then took place. In the course of the negotiations William Shackell introduced to the defendants a man whom he represented to be a Mr. Jones, carrying on business as Jones & Co. who, he alleged, was the agent in Sydney for James Shackell & Co. The price of the wool packs being agreed upon a sale note was signed: 'William Shackell for James Shackell & Co.' The following day a document purporting to be a store warrant for the bales of wool packs was handed over to the defendants, who thereupon handed the promissory note, the subject of the action, to Jones, who gave a receipt for the promissory note which he signed: 'J. Shackell & Co., per Jones & Co.' The defendants shortly afterwards discovered that they had been the victims of a fraudulent conspiracy on the part of the two men, W. Shackell and Jones, who in fact had no wool packs to dispose of, and no authority to act for James Shackell & Co., or any other firm. W. Shackell was subsequently convicted of conspiracy, while Jones absconded. Meanwhile they had between them forged on the note one indorsement purporting to be that of 'J. Shackell & Co. without recourse,' and another indorsement purporting to be that of 'Jones & Co.,' and discounted the note with the plaintiff Bank at the current rate of discount, the Bank relying on the defendant's signature and discounting the note bona fide in the ordinary course of business. The defendants on becoming aware of the fraud and that the promissory note was under discount with the plaintiff Bank gave notice to the Bank on February 6, 1892, that they repudiated the contract of sale and any liability in respect of the note on the

ground that it had been negotiated by means of a forged indorsement. The promissory note was duly presented for payment at maturity, but payment was refused.

At the time when the defendants made the promissory note there was no person or firm in Melbourne or elsewhere carrying on business under the name of James Shackell & Co. or J. Shackell & Co., but at a time some years previous to the making of the note, a certain Mr. James Shackell had carried on business in Melbourne under the style of 'James Shackell & Co.,' and Mr. James Shackell was still alive in Melbourne at the time of the making of the note, but had ceased to carry on business. The plaintiffs were not aware of these facts. The defendants when they made the note were not aware that the firm of James Shackell & Co. had ceased to exist, but believed that they were in fact dealing with that firm and in that belief inserted the name of J. Shackell & Co. as payees in the note. Under these circumstances the Court held that the payee was a fictitious or non-existing person, and that the note might be treated as payable to bearer, and on this ground ordered the verdict to be entered for the plaintiff Bank.

The Chief Justice in delivering the judgment of the Court, after a short statement of the facts, said:—

'We are of opinion that this case falls precisely within the law laid down in the *Bank of England* v. *Vagliano*, which is to the effect that wherever the name inserted as that of a payee in a bill or note is inserted without any intention that payment shall only be made in conformity therewith, the payee becomes a fictitious person within the meaning of the Bills of Exchange Act, 1882, s. 7, sub-s. 3, and that such bill or note may be treated by a legal holder as payable to bearer. Here James Shackell & Co., the supposed payees, even if an existing firm, had no interest in the note, no right to indorse it, or be paid upon it; and as they had not, then no person as payee had any such right. The payees were accordingly fictitious persons, and the plaintiffs are therefore holders of this note as if it were payable to bearer, and may, as such holders, sue the defendants, as makers, upon a note made payable by the defendants to bearer. It is argued that as the indorsement of James Shackell & Co. is forged, the plaintiffs cannot claim under a forged indorsement. This would be so if James Shackell & Co. were real payees, but as they are fictitious payees they could not indorse. The forged indorsement may accordingly be treated as a nullity, and the defendants are liable as though the note was by them made payable to bearer. We are, therefore, of opinion that the plaintiffs are entitled to recover upon this note[1].'

[1] New South Wales Weekly Notes, vol. ix. pp. 122–3.

The English Bills of Exchange Act, 1882, has been re-enacted in the seven principal Australasian Colonies in the following order of date; viz. New Zealand in 1883, Victoria in 1883, where the Act has since been repealed and re-enacted as Part I. of the Instruments Act, 1890, Western Australia, South Australia, Queensland and Tasmania in 1884, and New South Wales in 1887; and although every section of the English Act is not reproduced in identical words in each of those Colonies, speaking generally the differences are very slight. The importance therefore of the above decision, if it is to be regarded as correctly laying down the law as to the interpretation of s. 7 (3) when applied to a promissory note, is manifest.

It will be observed that in this case the Court did not base their decision on the ground that at the time when the note was made there was no existing firm of James Shackell & Co., but on the ground that even if there were such a firm they 'had no interest in the note, no right to indorse it, or be paid upon it.' The name of a payee was inserted, it was said, without any intention that payment should be made only to such payee or his order, and therefore the case fell precisely within the principle of Vagliano's case. When it is said that the name of the payee was inserted without any intention that payment should be made only to such person or his order, it must mean without any intention on the part of the conspirators, W. Shackell & Jones. It is admitted that so far as the makers of the note were concerned they had the fullest intention that it should be paid only to James Shackell & Co.'s order, although had they not been fraudulently misled as to matters of fact they would have formed no such intention and given no promissory note. In the same way, it may be argued, in Vagliano's case the acceptor of the so-called bills fully intended that they should be paid only to Petridi & Co.'s order, yet as Glyka who in fact drew them never intended Petridi & Co. to be the payees, they were deemed to be fictitious or non-existing persons, although in fact they were a real firm in the habit of doing business with Vagliano, the acceptor. Where then lies the difference between the two cases?

Although it is true that the position of maker of a note corresponds for the most part with that of acceptor of a bill, this must be taken with the necessary modifications arising from the difference in the nature of the two instruments: see s. 89 of the Act. The acceptor of a bill is estopped from denying as against a holder in due course the existence of the drawer, the genuineness of his signature and his capacity and authority to draw the bill: s. 54 (2) (*a*). No such estoppel can affect the maker of a note

to whom there is no prior party to stand in a position corresponding to that of drawer. Indeed in some respects the maker's position strongly resembles that of drawer of a bill. The maker of a note, like the drawer of a bill, is the creator of the instrument. It is he who names the payee. He is estopped from denying as against a holder in due course the existence of the payee and his then capacity to indorse, but not the genuineness or validity of his indorsement: cf. sections 54 (2) (*c*), and 55 (1) (*b*).

The original theory of a bill is that the drawer has effects in the hands of the acceptor against which he draws. 'A drawee who accepts a bill,' said Lord Herschell in the *Bank of England* v. *Vagliano*[1], 'does so either because he has in his hands moneys of the drawer, or expects to have them before the bill falls due, or because he is willing to give the credit of his name to the drawer and to make him an advance by payment of his draft. It is immaterial to the acceptor to whom the drawer directs him to make payment: that is a matter for the choice of the drawer alone. The acceptor is only concerned to see that he makes the payment as directed so as to be able to charge the drawer.' The maker of a note, on the other hand, himself promises to pay a sum of money on demand or at a future time. Who is to be named in the note as payee is a matter for his choice alone. If he promises to pay to a certain existing person only, no one else can as a general rule claim payment. If he promises to pay to a certain existing person's order, he can as a general rule refuse to pay except on that person's indorsement. If he has been induced to make the promise by means of false representations, can he not still refuse to pay except on that person's indorsement? Does the circumstance that some rogue, who by false representations got the note made, never intended that the payee named therein should receive the money, deprive the promisor of this right to refuse payment if the note is not indorsed by the payee named by him; and can he be on that account compelled to pay to any holder who has taken the note bona fide for value but on a forged indorsement? Does Vagliano's case establish such a proposition?

If this be the effect of section 7 (3) of the Bills of Exchange Act on notes made payable to order, surely a very wide door has been opened to fraud. If it be the law as to promissory notes, it must apply with certainly equal force to cheques. The most careful man of business may at some time be made a victim to a skilfully devised fraud. Is the circumstance of his making a promissory note or cheque payable to the *order* of a payee to afford him no protection in case of forgery? Is the circumstance that the man

[1] '91, A. C. 147–8.

who induced him to make the note or cheque had no intention of its reaching the payee named sufficient to constitute the payee a fictitious or non-existing person so that the note or cheque may be treated as payable to bearer? Is it not the intention of the maker of the note or of the drawer of the cheque as to who is to be the payee that must be regarded, and not the intention of the man who may by a false pretence have procured the note or cheque to be given, but who is himself no party to the instrument? If the maker of the note intends it to be paid only to the order of the payee whom he names, can it be said, in the language of Lord Herschell, that 'the name inserted as that of the payee is so inserted by way of pretence merely, without any intention that payment shall only be made in conformity therewith[1]?'

If, however, the New South Wales decision in the *City Bank* v. *Rowan* cannot be supported on the ground stated, the more difficult question remains: Can it, having regard to the facts of the case, be supported on any other ground? Although the defendants at the time of making the note fully intended it to be paid only to the order of James Shackell & Co., that firm had, unknown to them, ceased to exist. Was then the firm of J. Shackell & Co. 'a fictitious or non-existing person' within the meaning of s. 7 (3) of the Act? That the firm at that time had actually ceased to exist is admitted. But does the mere fact that a person or firm named as payee has ceased to exist render such payee 'a fictitious or non-existing person' within the meaning of that section?

Suppose that Brown owes Smith £100, and Brown intending to pay Smith draws a cheque at 11 a.m. for the amount payable to Smith or order, and posts it to his place of business. That morning at 10 a.m. Smith dies, but Brown does not hear of his death till some days later. Smith's letters are opened by a dishonest clerk, who forges Smith's signature to the cheque and takes it to Jones, who in good faith cashes it. If Smith had died at 11.30 a.m. it is clear that Jones could not sue on the cheque, the forged signature being wholly inoperative: see section 24 of the Act. But as Smith died at 10 o'clock, can Jones sue on the cheque on the ground that at 11 o'clock, when it was drawn, Smith had become a fictitious or non-existing person, and therefore that the cheque was payable to bearer? Can the question whether a bill or note is payable to order or to bearer depend upon ascertaining the precise hour at which the payee may have died? Is such a distinction in accordance with principle? Even if the case be literally covered by the language of s. 7 (3), is it within the true meaning of that enactment? In Vagliano's case Lord Halsbury

[1] '91, A. C. 153.

came to 'the conclusion that, however expressed, the real meaning of the subsection is to imply the unreality of any person who is named upon the face of the instrument as the payee of the bill[1].' To use again the language of Lord Herschell, in whose conclusion four noble and learned lords concurred: 'Whenever the name inserted as that of the payee is so inserted by way of pretence merely, without any intention that payment shall only be made in conformity therewith, the payee is a fictitious person within the meaning of the statute, whether the name be that of an existing person, or of one who has no existence, and the bill may, in each case, be treated by a lawful holder as payable to bearer[2].' As already observed, the intention here referred to is clearly the intention of the drawer who originates the instrument and names the payee. Now, in the case supposed, the intention of Brown when he drew the cheque was to pay Smith. The circumstance that Smith had died shortly before was *ex hypothesi* unknown to Brown when he drew the cheque. It cannot, therefore, possibly be said that Brown inserted Smith's name as that of the payee by way of pretence merely, without any intention that payment should be made only to Smith or his order. On the contrary his intention was that payment should be made only on Smith's indorsement, and if Smith had lived for another hour it seems clear that no one could have enforced payment of the cheque without that indorsement but Smith's personal representatives[3].

To return now to the facts in the *City Bank* v. *Rowan*, it appears that the defendants knew, at any rate by reputation, James Shackell & Co., the name under which Mr. James Shackell had carried on business in Melbourne, but they did not know that he had ceased to carry on business. They were induced by false pretences to make a sham purchase of goods, and believing that the goods were in existence and were ready to be delivered to them, they made their promissory note for the purchase money payable to 'J. Shackell & Co. or order.' Here again, as in the above hypothetical case of the cheque, it cannot be said that the defendants inserted J. Shackell & Co.'s name as that of the payees by way of pretence merely, without any intention that payment should be made only to that firm's order. Their intention, it is clear, was that payment should be made only on that firm's indorsement. Does not this distinguish the case in principle from that of the *Bank of England* v. *Vagliano*?

If the circumstance that the person named as payee in a promissory note or cheque was at the time of making it dead, or that

[1] '91, A. C. 122. [2] Ib., 153.
[3] Cf. *Murray* v. *East India Co.* (1821), 5 B. & Ald. 204.

the firm named as payee had at that time ceased to carry on business—such circumstance being unknown to the maker of the note or cheque—is alone sufficient to render the payee a fictitious or non-existing person within the meaning of the statute, so that the note or cheque may be treated as payable to bearer, large facilities for passing off such documents on forged indorsements seem to be afforded by this enactment, even in the case of inland notes or cheques, and the facilities will be far greater in the case of instruments made abroad, when, owing to distance, information of a person's death, or of dissolution of partnership, may frequently be delayed for a considerable time. This consideration, it is true, has little or nothing to do with the construction of the enactment in question, and if it be clear that the matter is governed by the decision in Vagliano's case, further discussion of it would be useless. If, however, the difference in the nature of the instruments, and in the position of maker of a note and drawer of a cheque on the one hand and of acceptor of a bill on the other, is such as to constitute the distinction suggested, it may be of some service to draw attention to the danger that appears to exist of that distinction being overlooked.

ARTHUR R. BUTTERWORTH.

Sydney, New South Wales.

INSURANCE OF LIMITED INTERESTS.

MORTGAGOR AND MORTGAGEE.

IN the law of insurance against fire the questions of greater theoretical interest relate to insurances of what are known as 'limited interests.' Familiar examples of such interests exist where the right of property in the owner is qualified by a mortgage, lease, or subsidiary right arising out of the contract of sale, carriage. or bailment. In the present article it is proposed to deal with the case of insurance by the mortgagor and mortgagee as a typical case, and as exemplifying the principles which apply to all insurances of limited interests. The fundamental principles are that a fire policy is a contract of indemnity, and that, in its usual form, it is a personal contract. The former is founded on considerations of public policy, and is a rule of law which cannot be set aside by consent of parties. It must not be confounded with the statutory rule against wager insurance, which requires that the insured should have an interest at the time of effecting the policy, but lays down no rule as to the amount recoverable in the event of a loss. The principle that the contract is personal is merely a rule of construction, and there is nothing illegal in a policy so framed as to attach to the property and pass to an assignee on a transfer.

The cases on fire insurance in America are much more numerous than in this country, and the theory of the law has consequently been more elaborately developed. It has therefore been thought necessary to refer to American authorities. The references are almost exclusively to cases decided in the Supreme Court of the United States, and to the decisions in the series of cases selected from the 'State Courts Reports' and republished in the 'American Decisions,' 'American Reports' and 'American State Reports[1].'

1. *Effect of mortgage on owner's insurable interest.—Amount recoverable under policy.*—The owner's insurable interest is not impaired by the existence of a mortgage or other lien upon his property. It would be otherwise if the debt were discharged by the loss of the security,

[1] The abbreviated references usually adopted are U. S. for Otto's Supreme Court Reports; Am. D., Am. R., and Am. St. R., for the American Decisions, American Reports, and American State Reports respectively. The fourth series of Court of Session Reports (Scotland) is referred to by the initial of the Reporter, R. In dealing with Scotch cases the Scotch legal phraseology has not been altered.

as in the case of a loan upon a bottomry or respondentia bond[1]. In these loans the risk of a total loss is upon the lender, and not on the owner, who can, therefore, recover under his policy of insurance the excess only of the value of the security over the amount of the advance[2]. Where the question is one of insurable interest it is not the legal but the equitable title that is regarded, and therefore the owner's rights are the same even where the security is constituted by a deed *ex facie* absolute[3]. But it is a defence to an owner's claim upon a policy of insurance that his interest in the subject insured has been divested by actual foreclosure of the mortgage or by a sale at the creditor's instance. And if he assign to creditors who release, his right to recover upon a policy in his own name is limited to the surplus, if any, which would have been due to him after the claims of his creditors had been satisfied[4]. So also if he sell his equity of redemption subject to the mortgage, his interest is limited to the amount of the unpaid mortgage debt for which he still remains liable if the security is destroyed[5].

2. *Mortgagee has no lien upon proceeds of mortgagor's policy except by contract or under statute.*—Where the insurance is effected in the owner's name, a mortgagee or other creditor holding a lien over the subject insured has in general no corresponding lien upon the money due upon the owner's policy in the event of a loss[6]. Nor does it give the mortgagee such a lien that the mortgagor is under covenant to insure or is bound to repair[7]. But if the mortgage deed provides that the proceeds of the mortgagor's policy shall be applied to the restoration of the damage or in liquidation of the mortgage debt, the mortgagee is entitled to insist that the proceeds shall be so applied, and his claim would be valid against the general creditors of the mortgagor[8]. And by the Conveyancing Act of 1881 mortgagees, where the mortgage is constituted by deed, and is subsequent to the date of the Act, are virtually in the same position as if the mortgage deed contained one or other of these provisions[9].

Under the 83rd section of the Metropolitan Building Act insurers

[1] *Alston* v. *Campbell*, 4 Brown's Parl. Cas. 476; *Hibbert* v. *Carter*, 1 T. R. 745; 1 R. R. 388; Arnold Ins. p. 85.

[2] Arnold Ins. p. 88.

[3] *Alston* v. *Campbell*, *supra*.

[4] *Lazarus* v. *Com. Ins. Co.*, 2 Am. L. Cas. 797, 801; 5 Pickering, 76; 19 Id. 81; *Seagrave* v. *Union M. I. Co.*, L. R. 1 C. P. 305, 319.

[5] Philip's Ins. sec. 287, citing *Gordon* v. *Mass. Fire & Mar. Ins. Co.*; 2 Pick. 249.

[6] *Lees* v. *Whiteley*, L. R. 2 Eq. 143; *Rayner* v. *Preston*, 14 Ch. D. 297, 18 Ch. D. 1.

[7] *Lees* v. *Whiteley*, *supra*; *Leeds* v. *Cheetham*, 1 Sim. 146; *contra*, *Nordyke & Marmon Co.* v. *Grey*, 2 Am. St. R. 219, 223; *Wheeler* v. *Ins. Co.*, 101 U. S. 439, 442, and authorities collected 2 Am. L. Cas. p. 834, 5th Ed.

[8] *Garden* v. *Ingram*, 23 L. J. Ch. 478, discussed in *Lees* v. *Whiteley*, and *Rayner* v. *Preston*, *supra*.

[9] 44 & 45 Vict. c. 41, sec. 23; Fisher's Law of Mortgage, sec. 1458. The Act does not apply to Scotland.

are authorized and required upon the request of any person 'interested in or entitled to' the buildings injured by fire, to cause the sum insured to be expended in reinstatement[1]. The owner of premises insured by his tenant has been held to be a person interested in, or entitled to the property, in the sense of this provision, but doubts have recently been thrown upon its applicability to mortgagees or purchasers from the insured[2]. It is clear that the Act contemplated insurances by policies so framed as to run with the lands, and not by policies, which, like ordinary fire policies, are personal contracts of indemnity. Where the policy is in the form of a personal contract the correct view seems to be that only those are entitled to the benefit of the Act who are parties to the contract of insurance as well as interested in the subject insured[3]. In any event the Act cannot operate to extend the insurer's liability beyond the interest of the persons with whom his contract is made. For instance, it cannot entitle a purchaser to the benefit of a vendor's policy where the title and interest of the vendor is wholly divested. A similar limitation applies to the provisions of the Conveyancing Act 1881. A claim under the Building Act must be made while the sum due upon the policy is still in the insurer's hands[4].

3. *Effect of indorsation of mortgagor's policy to mortgagee.—Joint policies.*—In the United States the mortgagor's policy frequently contains an indorsation directing payment in case of loss to be made to the mortgagee. This direction does not operate an assignment of the policy, or make the mortgagee a party to the principal contract. The indorsation constitutes properly a collateral contract, by his assent to which the insurer binds himself to pay in the manner directed, and in an action by the insured he may plead such payment as performance[5].

The result is the same whether the policy is procured and the premiums paid by the mortgagor or by the mortgagee, and the indorsation has no effect upon the contract as an insurance. Thus the insurer will be entitled to plead a breach of a condition by the mortgagor, as a defence to an action upon the policy or to claim contribution from other insurers of the mortgagor[6]. Conversely he will not be entitled to claim contribution in respect of

[1] 14 Geo. III. c. 78, sec. 83. This section applies generally to England. *Ex parte* Gorely, 4 De G. J. & S. 477, doubted in *Westminster Fire Office* v. *Glasgow &c. Soc.*, 13 App. Cas. 699, 713. The Act does not apply to Ireland or Scotland.

[2] *Ex parte* Gorely, *supra*; *Rayner* v. *Preston*, 14 Ch. D. 297; 18 Ch. D. 1; *Westminster Fire Office* v. *Glasgow &c. Soc.*, *supra*.

[3] Per Lord Selborne in *Westminster Fire Office* v. *Glasgow &c. Soc.*, *supra*.

[4] *Simpson* v. *Scottish Union*, 1 H. & M., 618.

[5] *Martin* v. *Franklin Fire Ins. Co.*, 20 Am. R. 372; *Coates* v. *Penn Fire Ins. Co.*, 42 Am. R. 327.

[6] Cases cited in previous note.

other insurance by the mortgagee [1]. A policy in this form is, therefore, to be distinguished from one which insures the mortgagor and mortgagee jointly, as where the parties are so described in the policy. In both cases the mortgagee is primarily entitled to the insurance money to the extent of the mortgage debt, but in the former case he is in general entitled, as the party in whose favour the appointment is made, to sue alone, while in the latter the action upon the policy must be brought by both the contracting parties [2].

When the indorsation is not to the whole sum insured, but is limited to the extent of the mortgagee's interest, there is some conflict of decision as to the right to sue upon the policy, but it has been held that the mortgagor may sue alone where his action is brought with the written consent of the mortgagee [3].

If a similar direction is made in a life policy the rule is different; the person to whom payment is directed to be made has, in that case, the sole and exclusive right to the policy. The distinction arises from the different nature of the contracts of life and fire insurance. The former is simply an agreement to pay a stipulated sum on a given event, and does not require that the assignee to the benefit of that obligation should have any interest in the life insured. If such a direction in a fire policy were held to have the effect of an assignation, the result would be to limit the insurer's obligation to the interest provable in the assignee.

4. *A lien, when valid, gives an insurable interest.—Interest need not be specified in policy.*—A mortgagee or other creditor who holds a lien has an insurable interest in the security [4]. A lien which is invalid in itself, as where it is constituted by an agent without authority, or where the pledge remains in the hands of the pledger, will not give an insurable interest [5]; but it is immaterial that the lien may be defeated at the instance of the grantor or of third parties, or that the title of the mortgagee is merely equitable [6]. A general creditor has, *a fortiori*, no insurable interest in his debtor's goods, and the fact that the loss of a ship or cargo will render the owner insolvent has been held not to entitle a creditor to insure [7]. A creditor may

[1] *Gillett* v. *L. L. & Globe Ins. Co.*, 9 Am. St. R. 784.

[2] *Rogers* v. *Grazebrooke*, 12 Simon, 557; *Molley* v. *Manufactures Ins. Co.*, 50 Am. D. 591; *Hammel* v. *Queen Ins. Co.*, 41 Am. R. 1.

[3] *Fire Insurance Co.* v. *Felrath*, 54 Am. R. 58; *Gillett* v. *L. L. & Globe Ins. Co.*, 9 Am. St. R. 784, citing *Westchester Fire Ins. Co.* v. *Foster*, 90 Ill. 121.

[4] *Godin* v. *London Assurance Co.*, 1 Burr. 490; *London & North Western Railway Co.* v. *Glyn*, 1 E. & E. 652; *Westminster Fire Office* v. *Glasgow &c. Soc.*, 13 App. Cas. 699; *Bell* v. *Western M. & F. Ins. Co.*, 39 Am. D. 542.

[5] *Stainback* v. *Fenning*, 11 C. B. 51; *Little* v. *Phoenix Ins. Co.*, 25 Am. R. 96.

[6] *Hill* v. *Secretan*, 1 B. & P. 315, 4 R. R. 806; *Columbian Ins. Co.* v. *Lawrence*, 2 Peters, 25 (S. Ct. U. S.); *Williams* v. *Roger Williams Ins. Co.*, 9 Am. R. 41; *Alston* v. *Campbell*, 4 Brown's Parl. Cas. 476.

[7] *Manfield* v. *Maitland*, 4 B. & Ald. 582; *Grevemeyer* v. *Southern Ins. Co.*, 1 Am. R. 420; but see *Rohrback* v. *Germania Fire Ins. Co.*, 62 N. Y. 47; 20 Am. R. 451.

insure his security by a policy in ordinary form upon the property, and is not bound to specify in the policy, or disclose to his insurer, the limited nature of his interest [1].

5. *Mortgagee's interest measured by debt.—Policy not assignable.—Exceptions.*—The mortgagee's policy becomes inoperative if the debt is paid, because he sustains no loss by the destruction of the security; but it will cover all advances made upon the security even after the date of the policy [2]. Nor is the mortgagee entitled, after his individual interest has lapsed, to assign the policy to the mortgagor, or to keep it alive for his benefit, unless the form of the policy is such as to admit of assignment, or to make the mortgagor a party to the contract [3]. This is the effect given by mercantile usage to the clause in a marine policy which extends the insurance 'to all to whom the property does or may appertain in part or in all,' or 'for whom it may concern,' but, except in the case of a bailee's floating policy, there is no such clause in ordinary fire policies, and the scope of the insurance is therefore limited to the persons named [4].

It is an exception to this rule that if the mortgagee hold the legal title to the security (and before the Registry Acts the mortgagee of a ship was in this position), he may insure in his own name for his own benefit, and also as trustee for a mortgagor or other person interested; but he must intend to cover such interest at the time of effecting the policy. And the same limitation applies to the case of an agent procuring an insurance in general terms 'for whom it may concern.' Only those persons are included in the general words and made parties to the original contract whom it was the agent's intention to insure when he obtained the policy. Thus in *Irvine* v. *Richardson*, where the insurance was effected by the mortgagee of a ship, under a marine policy in the usual form, the Court left it to the jury to say whether the insurance was intended to cover the defendant's own interest as mortgagee or that also of the mortgagor [5].

6. *Subrogation of mortgagee's insurer.*—Where the mortgagee, in the absence of any agreement as to insurance with the mortgagor,

[1] *Crowley* v. *Cohen*, 3 B. & Ad. 478; *Carruthers* v. *Sheddon*, 6 Taunt. 14; Duer on Ins. ii. 80; *King* v. *State Mut. Fire Ins. Co.*, 54 Am. D. 683; *Hubbard* v. *Hartford Fire Ins. Co.*, 11 Am. R. 125. *Contra*, *Smith* v. *Columbia Ins. Co.*, 55 Am. D. 546.

[2] *Carruthers* v. *Sheddon*, *supra*; Duer on Ins. ii. p. 43 et seq.

[3] *Lynch* v. *Dalzell*, 4 Bro. Parl. Cas. 431; *Sadlers Co.* v *Badcock*, 2 Atk. 554; *Rayner* v. *Preston*, 18 Ch. D. 1; *Castellain* v. *Preston*, 11 Q. B. D. 380, per Bowen L.J., p. 398; *Ebsworth* v. *Alliance Mar. Ins. Co*, L. R., 8 C. P. 596, per Brett J., pp. 637, 638; *McDonald* v. *Black*, 55 Am. D. 448; *New York Ins. Co.* v. *Flack*, 56 Am. D. 742. *Contra*, *Norwich Fire Ins. Co.* v. *Broomer*, 4 Am. R. 618.

[4] *Powles* v. *Innes*, 11 M. & W. 10; *Hooper* v. *Robinson*, 98 U. S. 528, 538; *Home Ins. Co.* v. *Baltimore Warehouse Co.*, 93 U. S. 527, 542; *California Ins. Co.* v. *Union Compress. Co.*, 133 U. S. 387, 410; *Newson* v. *Douglas*, 16 Am. D. 317, 320.

[5] *Irvine* v. *Richardson*, 2 B. & Ad. 193, 196; *Watson* v. *Swann*, 11 C. B., N. S. 756; Philips, sec. 383, and cases in two previous notes.

insures the security in his own name, the payment of a loss by the insurer is not a defence to an action for the debt against the mortgagor. He is not a party to the contract of insurance, and has no claim to the sum due under it, while on the other hand the mortgagee is not entitled to charge the premiums for the insurance upon the security [1]. At the same time the mortgagee is not entitled to obtain payment of his debt twice over, and his insurer has upon payment of the loss, and as an incident to the principle of indemnity, a right of subrogation to all the means competent to the mortgagee by which the loss may be made good. He is therefore entitled to the benefit of the mortgagee's lien over the salvage of the security, and any collateral securities he may hold for the debt, as well as his personal claim for the debt against the mortgagor. If the mortgagee has enforced any of these remedies in his own name, he holds the proceeds as trustee for the insurer; if they exist as rights of action, the insurer may sue upon them in the name of the insured, and retain the proceeds to the extent of the sum he has paid [2]. If the sum due and recovered upon the policy is less than the mortgage debt, the mortgagee is entitled to enforce for his own benefit his other remedies without interference from the insurer, to the effect of recovering a full indemnity. Beyond this he holds the proceeds for the insurer, and he cannot, after a loss, release his unenforced claims gratuitously, or otherwise defeat the insurer's right to an assignment [3].

7. *Right of subrogation of no value if debtor insolvent.—May be excluded by contract.—Effect of Conveyancing Act* 1881.—The insurer's right of subrogation will be of no value, or only of partial value, if the mortgagor is insolvent and the security destroyed. The remedy is also subject to the limitation that the insurer, as a mere assignee, may be met by any defence which would have been valid against the insured. Thus if the mortgagee have, before the loss, contracted with the mortgagor that the sum recovered under his policy shall be reckoned as part payment of the mortgage debt, or that it shall be applied for the mutual benefit in restoration of the damage, the insurer has no right of recourse against the mortgagor [4]. On the same principle an insurer who has paid to the owner of a vessel a loss caused by collision has no right of recourse if the insured is also

[1] *Dobson* v. *Land*, 8 Hare, 216; *Bellamy* v. *Brickenden*, 2 J. & H. 137; *Brook* v. *Stone*, 34 L. J. Ch. 251; *Rayner* v. *Preston*, 14 Ch. D. 297; 18 Ch. D. 1.

[2] *Castellain* v. *Preston*, 11 Q. B. D. 380; *Darrell* v. *Tibbitts*, 5 Q. B. D. 560; *contra*, *King* v. *State Mut. Fire Ins. Co.*, 54 Am. D. 683.

[3] *Commercial Union* v. *Lister*, 43 L. J. Ch. 601; 9 Ch. App. 483.

[4] *Nichols* v. *Scot. Union & Nat. Ins. Co.*, reported 14 R. Appendix, p. 1094; *Phoenix Ins. Co.* v. *Erie &c. Co.*, 117 U. S. 312, 321; *Kernochan* v. *New York Bowery Ins. Co.*, 17 N. Y. 428; *Nelson* v. *Brook Mut. Fire Ins. Co.*, 3 Am. St. R. 308; *Clinton* v. *Hope Ins. Co.*, 45 N. Y. 454.

owner of the vessel in fault [1]. In such a case the insured could not sue himself, and therefore there is no right of action to which the insurer could claim an assignment.

The effect will be the same even in the absence of any provision as to insurance where the mortgage falls within the provisions of the Conveyancing Act of 1881 [2].

It has been held that where the mortgagor is thus entitled to the benefit of the mortgagee's insurance, and procures in addition other insurance upon his interest as owner, the two insurances constitute, as regards the owner, double insurance, and the insurers will contribute rateably to make good the loss [3].

8. *No duty to disclose agreement affecting right of subrogation.—Special stipulation for subrogation.*—In general a mortgagee or other creditor who insures independently of the owner is not bound to disclose the existence of agreements with the owner which affect the insurer's right of recourse, although they may materially increase his ultimate liability. Where, however, such agreements are made the subject of special inquiry, or where the insured is otherwise made aware that the premium is calculated upon the hypothesis that the insurer will be entitled to an assignment on payment, a duty of disclosure will arise [4].

In some policies a special stipulation for subrogation is inserted, and, where that is the case, the insurer is not bound to make good the loss if the insured has contracted away his right to make good the stipulation [5].

9. *Insurer of creditor's interest has not same rights as surety for debt.*—Although a creditor's insurance operates indirectly as a guarantee of the debt, his insurer is not in the position of a surety, and does not acquire all the rights of a surety. A surety's guarantee would be cancelled by a release of the debtor by the creditor, or by a surrender of collateral securities at any time; but unless the release is granted or the surrender made after a loss, they do not afford a valid defence to an insurer. The insurer's rights of recourse against the debtor and against the security only emerge upon the happening of a loss, and arise not from an implied term of a contract, as in the case of a surety, but as an incident of the principle of indemnity. The loss for which the insurer is ultimately liable is increased by the insolvency of the debtor, and by the existence

[1] *Simpson* v. *Thompson*, 3 App. Cas. 279.

[2] 44 & 45 Vict. c. 41, sec. 23, subsecs. 3 and 4.

[3] Nichols, *supra*; contrast *Scottish Amicable* v. *North Ass. Co.*, 11 R. 287; and see also *Jackson* v. *Mass. Mut. Fire Ins. Co.*, 34 Am. D. 69; *Carpenter* v. *Prov. Wash. Ins. Co.*, 16 Pet. (S. Ct. U. S.) 495; 2 Am. L. Cas. 865.

[4] *Tate* v. *Hyslop*, 15 Q. B. D. 368; *Phoenix Co.* v. *Erie Co.*, 117 U. S. 312, 326; *Jackson Co.* v. *Boyeston Co.*, 52 Am. R. 728; *contra*, *Smith* v. *Columbia Ins. Co.*, 55 Am. D. 546.

[5] *Foster* v. *Van Reid*, 26 Am. R. 544; *Kernochan* v. *N. Y. Bowery Ins. Co.*, 17 N. Y. 428.

of prior incumbrances upon the security; but, as we have seen, the insurer is not entitled to rely upon these remedies being kept open for him, and they are not circumstances which as a rule are taken into account in estimating the risk or fixing the premium [1].

10. *Separate insurance by mortgagor and mortgagee.—No contribution between insurers.—Adjustment of loss, and rights of insurers* inter se.—If the mortgagor and mortgagee have insured the security for their separate interests the insurances do not constitute double insurance, nor is the loss settled on the principle of contribution. The whole loss is borne by the mortgagor's insurer. The reason of this rule is that the interests insured are not the same, and that the insurers, as regards their mutual rights, stand in the place of the insured. The mortgagee has a remedy in the event of a loss upon the personal obligation of the mortgagor, and to this remedy his insurer is entitled upon payment of the sum due under the mortgage. At the same time the mortgagor, who is called upon to pay up the debt on the destruction of the security, is entitled to throw this liability upon his insurer as part of the loss. To the extent of the charges upon the property the mortgagor's insurance is therefore practically a reinsurance of his personal liability for the debt [2].

It is not, however, a defence to a claim upon the mortgagee's policy that the remedy which falls to be assigned to his insurers is of no value owing to the insolvency of the mortgagor, even where the whole amount of the fire damage has already been made good to the estate by the mortgagor's insurer. We have seen that the mortgagee has no lien upon this sum, and can only claim for his debt *pari passu* with the other creditors of the insured. It has been objected that to allow the mortgagee to recover in such a case from his own insurer would violate the principle of indemnity, inasmuch as more would be recovered upon the two policies than the damage done by fire. This anomaly is explained by the fact that the risk covered by the two policies is not the same. The contingency against which the mortgagor's policy provides is a loss by fire, while the mortgagee's policy provides against the concurrence of two events, a loss by fire and the insolvency of the mortgagor. A primary liability arises on the first contingency, but ultimate liability depends on the concurrence of both [3].

11. *Measure of mortgagee's loss.—How affected by* (1) *Reinstatement of security,* (2) *Solvency of debtor,* (3) *Sufficiency of remaining security.*—If the premises injured by fire have been reinstated by the owner

[1] *Insurance Co.* v. *Stinson*, 103 U. S. 25 at p. 28.

[2] *N. B. Ins. Co.* v. *L. L. & Globe Ins. Co.*, 5 Ch. D. 569, 583; *Darrell* v. *Tibbitts*, 5 Q. B. D. 560.

[3] *Westminster Fire Office* v. *Glasgow &c. Soc.*, 14 R. 947, 965; 15 R. (H. of L.) 89; 13 App. Cas. 699.

or by prior mortgagees, such reinstatement will, in general, be a defence to a claim by the mortgagee; but the ground of the defence is that the insured has suffered no loss, and it is not valid if it be shown that, notwithstanding the reinstatement, the value of the security is substantially impaired by the fire [1].

It is not a defence to the insurer that the debtor is solvent and that the insured may make good his personal claim against him. The insured is not bound to exhaust his remedies against third parties before claiming indemnity from his insurer [2].

It has not been decided in this country whether it is a valid defence that the security, although diminished in value by the fire, is still sufficient to cover the mortgage debt, and the American authorities upon the question are not unanimous. In the leading case the defence was rejected, and it was held that a mortgagee who has insured his separate interest is entitled, upon assigning his mortgage to his insurer, to claim the full amount insured wherever the security has been materially damaged by fire. The ground of judgment was that an insured is not bound to resort elsewhere than to his policy for indemnity, and that this principle, recognized as regards the mortgagee's personal claim against the debtor, is equally applicable to his remedy upon the mortgaged property [3].

The competing theory is that a mortgagee insures not the ultimate safety of the whole property, but its capacity to pay the mortgage debt, and that he can only claim under his policy the balance of his debt which his security remaining after the fire is insufficient to cover. As a consequence of this view it was held that, where insurance is effected by a mortgagee upon his special interest, the existence of prior incumbrances is material to the risk and must be disclosed [4].

The two theories may be illustrated by the following case. Suppose that property of the value of £1,000 is mortgaged to *A* for £500 and to *B* for £500, and that *A* and *B* insure in respect of their mortgage interests to the full amount of their debts. Suppose that the security is injured by fire to the extent of £500. If *A*'s mortgage be prior to *B*'s, *A*'s insurer upon the theory last explained would not be liable to him, because the value of the security is still sufficient, if realized, to pay his debt. *B*'s insurer upon the same

[1] *Westminster Fire Office* v. *Glasgow Prov. Ins. Soc.*, 13 App. Cas. 699, per Lord Selborne, pp. 712, 713; *Matheuson* v. *Western*, 10 Fr. Can. Rep. 8, cited Porter, Laws of Ins., p. 234.

[2] *Collingridge* v. *Royal Exch. Ass.*, 3 Q. B. D. 173; *Hancox* v. *Fishing Ins. Co.*, 3 Sumner 132 (American).

[3] *Excelsior Fire Ins. Co.* v. *Royal Ins. Co. of Liverpool*, 14 Am. R. 271, where all the authorities are reviewed, pp. 279, 283.

[4] *Smith* v. *Columbia Ins. Co.*, 55 Am. D. 546; *Carpenter* v. *Prov. Ins. Co.*, 16 Peters, 495; 2 Am. L. Cas. 865.

theory would be liable to him for £500 because his debt is wholly uncovered. On the first theory *A* and *B* would each be entitled to claim the whole sums insured, because *A*'s security is less valuable by its margin of £500 than it was before the fire, while *B*'s debt is, as before, entirely uncovered, *A*'s insurer having been subrogated to *A*'s preferable rights upon the security. Upon either theory the actual loss of £500 is ultimately made good by the insurer of the postponed creditor.

12. *Insurance by prior and subsequent incumbrancers.—When valid.—No contribution among insurers.*—Where several creditors hold liens over the same goods each may insure independently of the owner or of other creditors, and as the interests protected are distinct, the principle of contribution is not applicable to the settlement of the losses. The loss to each independent interest must be made good by the insurers of that interest[1]. If, however, the property is burdened to its full value, a subsequent lien, where it can be validly acquired, does not entitle the holder to recover upon a policy of insurance[2]. The loss to the holder of the security in such circumstances is the chance that, by the discharge of prior incumbrances, his security may become available, but this is a mere expectation, of which the realization is uncertain apart from the perils insured against, and has no insurable value[3].

Upon the same principle it has been held that subsequent incumbrancers cannot recover the rent of the property mortgaged, where it is included in the bonds of prior incumbrancers, and insured and recovered by them[4].

13. *Clause of contribution does not apply to insurance by other incumbrancers—even if owner made party to policies.*—In the *Scottish Amicable* v. *Northern Assurance Company*[5] the suit was brought upon a policy of insurance issued to the holders of prior bonds over heritable subjects in Scotland and to the owners of the subjects. The policy ran in the name of the bondholders and of the owners 'jointly and severally and in reversion,' and contained the usual contribution clause providing that if at the time of any loss occurring to the property thereby insured there should be any other subsisting insurance 'whether effected by the insured or any other person covering the same property,' the insurer should only be liable to contribute his rateable proportion of the loss. It appeared that at the time of

[1] *Godin* v. *London Assurance*, 1 Burr. 490; *Scottish Amicable* v. *Northern Ass. Co.*, 11 R. 287.
[2] Arnold, p. 118 et seq.
[3] *Lucena* v. *Crawfurd*, 3 B. & P. 75; 2 B. & P. N. R. 269; 6 R. R. 623; *Routh* v. *Thompson*, 11 East, 428; 10 R. R. 539; Arnold, p. 99.
[4] Westminster Fire Office, 15 R. (H. of L.) 89; 13 App. Cas. 699.
[5] 11 R. 287.

the loss the holders of postponed bonds held policies of insurance upon the same subjects, and that the owner was made a party, in respect of his reversionary interest, to their policies as well as to those issued to the prior bondholders. The main question in the case was whether the latter policies fell within the terms 'other insurance upon the same property.' It was held that the other insurance contemplated was a second insurance of the same interest in the same property, and that, as the interests primarily insured by the different policies were the separate interests of the bondholders, the provision did not apply. The words 'the same property' were held to mean the same proprietary interest, and the effect of the provision was thus merely to express the ordinary rule as to contribution between insurers of the same interest[1]. The insurers of the prior bondholders were therefore not entitled to limit their contribution to the fractional part of the fire damage represented by the ratio of the sum insured by them to the aggregate sums insured upon the security, but were bound to make good their contract of indemnity as if no other insurance existed upon the same subjects. The insurers under the different policies were agreed that the loss should be settled as if all the policies had been issued to the owner, and that they should contribute rateably to the fire damage and pay the amount into a common fund which should stand in place of the security destroyed. The arguments in favour of this view will be found expressed in the judgment of Lord Young, who dissented from the majority of the Court[2]. The majority rested their judgment upon the ground that the prior bondholders by whom the action was brought had no concern with other insurance to which they were not parties, and no right of action except under their own contract of indemnity.

14. *Insurance by subsequent incumbrancers, when valid.—Measure of loss.—Effect of payment by other insurers to prior incumbrancers.*—The decision in *The Scottish Amicable* v. *Northern Assurance Company* case was inferentially affirmed by the House of Lords in the subsequent case of the *Westminster Fire Office* v. *Glasgow Provident Investment Society* already cited[3].

The main question in the latter case was whether the postponed bondholders, by whom the action was brought, could recover upon their policies in respect of the same injury by fire to the bonded subjects. The policies held by the prior and postponed bondholders were issued by different companies, but they

[1] Cf. *N. B. and Mercantile Ins. Co.* v. *L. L. & Globe Ins. Co.*, 5 Ch. D. 569; *Etna Fire Ins. Co.* v. *Tyler*, 30 Am. D. 90.

[2] 11 R 295.

[3] 14 R. 947; 15 R. (H. of L.) 89; 13 App. Cas. 699.

were in the same terms, and covered the owner's reversionary right. They contained, in addition to the clauses already narrated, an option to reinstate and an allocation of the sums insured over the different insurable items of the security, which consisted of a mill and machinery, and the site upon which the mill stood. The pursuer's postponed bonds over the subjects amounted to about £800. The prior bonds amounted to over £8,600; but the value of the security, inclusive of the site, before the fire, was, according to the admission of the parties, sufficient to cover all the bonds. As the result of the judgment in the previous case the prior bondholders had recovered from their insurers, who had elected to reinstate, a sum sufficient for that purpose, fixed by arbitration at £5,668. This sum had not as matter of fact been expended in reinstatement, but had been applied by the prior bondholders in reduction of their debt. The value of the site and salvage of the mill and machinery after the fire was, at the lowest estimate, (that of the pursuer's valuators,) £3,500, this being the sum the subjects as they stood would have brought if sold in the market. The defenders' valuation was higher, but they admitted that the value of the site and salvage after the fire was less than £8,600, the amount of the prior bonds[1]. The pursuer's right to recover in these circumstances was sustained by the Court of Session and affirmed on appeal by the House of Lords.

In the Court below the majority of the consulted judges rested their judgment upon the admission that the damaged subjects did not in fact afford as good a security for the diminished debt as the entire subjects afforded for the whole debt before the fire, thus affirming the principle which is established by a preponderance of authority in America[2]. The same view was taken by the House of Lords, but the ground of judgment is less accurately made to rest upon the ground that the value of the security after the fire was insufficient to meet the balance due upon the prior bonds, and that the pursuer's security was therefore not only deteriorated but wholly destroyed as a consequence of the fire. The latter part of this proposition does not seem to be justified by the facts of the case so far as they appear upon the face of the Reports. The figures given above show that the balance due to the prior bondholders, after the payment made to them by their insurers, was, on a rough estimate, £3,000; while the reduced value of the subjects at the lowest estimate was £3,500, thus not only covering the balance due upon the prior bonds but leaving a margin of £500 available

[1] 13 App. Cas. 699, pp. 700 and 701.
[2] *Excelsior Fire Ins. Co.* v. *Royal Ins. Co.*, 14 Am. R. 271; *supra*, p. 56.

to meet the pursuer's bond of £800. The pursuer's bond was therefore uncovered to the extent of £300. It does not appear from the report whether the security was actually realized after the fire, or how the proceeds were dealt with; but however the facts may stand, the judgment of the House of Lords does not meet the question, which appears to have been raised by the facts, of a creditor's right to recover where his security is not wholly destroyed, but is so reduced in value by the fire as to cover only a part of the debt secured. Nor can any principle be deduced from the case as to the amount which the secured creditor can, in the case of such partial deterioration, recover under his policy of insurance. The question of amount, or the effect of the allocation of the sum insured upon the different items of the security, was not argued to the Court, and the actual sum of £230, to which the pursuers were ultimately found entitled, seems to have been arrived at by arrangement between the parties by a process which estimated the loss on each item separately and measured by the sum required to reinstate, and which was, therefore, in conflict with the principle of estimation of the loss upon which the right of the pursuer to recover at all rested[1]. The pursuer's proper course, in accordance with the latter principle, would have been either to claim the whole sum insured under offer to assign to his insurer any rights he might have in the security by which the loss might be reduced, or to realize the security so far as available to him after the fire, and claim the balance of the debt remaining due[2].

It ought also to be noticed that had the same method of settlement been applied in the case of the prior as in the case of the postponed bondholders, the payment to the prior bondholders, although upon an independent contract, might have been a valid defence to the claim by the postponed bondholders upon their policies. The ground of the defence would have been that they had sustained no loss, inasmuch as the diminution in value of their security occasioned by the fire was necessarily exactly equivalent to the reduction of the preferable debt with which it was burdened. The fallacy underlying the application of this argument to the case, which was strongly insisted on by the minority of the consulted judges in the Court below, was the assumption that the prior bondholders had received a full indemnity in the payment to them by their insurers of the sum required to reinstate the premises. As shown by Lord Selborne, this is a conclusion which is not generally admissible. The value of the salvage of

[1] 14 R. 957, 984.

[2] *Excelsior Ins. Co.* v. *Royal Ins. Co. of Liverpool*, 14 Am. R. 271; *Smith* v. *Columbia Ins. Co.*, 55 Am. D. 546; *supra*, p. 56.

a wrecked building, or of machinery damaged by fire, for the purpose of reinstatement is obviously greater than the price they would fetch as old stone or iron. The amount of the loss under a contract of indemnity is always a question of fact, and there is no hard and fast rule by which it is to be estimated. In the United States the view taken is that where the insurers, after a loss, elect to exercise an option to reinstate, the contract becomes a building contract, and the pecuniary measure of the insurer's obligation has no necessary relation to the sum for which he would be liable under a contract of indemnity [1].

15. *Mortgagor's rights under joint insurance.—No subrogation.—Aggregate amount recoverable, how limited.*—The question of the owner's rights under the joint insurance was not directly raised in the case of the Westminster Fire Office, nor the question whether the insurers upon payment to the bondholders could, as in the case where the creditor's interest alone is covered, have demanded an assignation to their rights in the security, or to their personal claim against the debtor. It would seem a conclusive answer to such a claim that the owner was insured as well as the creditor, and that, as against the insurer, he was entitled to a credit in respect of the money received under the policy [2]. The joint insurance was in effect a collateral security for the debt, the proceeds of which the creditor was bound to apply in reduction of the debt. The doctrine of subrogation would, therefore, not be applicable, because in so far as the debt was met by the payment under the policy, it was extinguished, and there was no right competent to the creditor to which the insurer could have asked an assignation. At the same time it would be at variance with the fundamental principle of the contract that the owner should, as the result of the transactions arising out of the loss, be more than fully indemnified for the injury to his interest. This would clearly be the case if the amount paid to his creditors exceeded the damage done to the security by the fire. The anomaly would be met if the owner were regarded as holding the salvage of the security to the extent of this excess in trust for the insurers, and subject to their equitable lien, upon the principles laid down in *Castellain* v. *Preston* [3]. It is also clear that if the excess so recoverable were apportioned among the insurers of the different creditors in the proportion of the indemnities paid by them, their ultimate liability would be the same as if the loss had been originally adjusted upon the contribution principle [4].

[1] *Morrell* v. *Irvine Fire Ins. Co.*, 88 Am. D. 396. [2] 14 R. 967.
[3] 11 Q. B. D. 380.
[4] *Supra*, section 13. For Actuaries the following proof will be sufficient. Suppose

The final result of the case would seem to be to establish the following propositions: (1) That a mortgagee or other incumbrancer has an insurable interest in the security notwithstanding the existence of prior incumbrances, provided the aggregate amount of the incumbrances is not greater than the value of the security. (2) A subsequent incumbrancer insuring his interest will have a right to recover in the event of a loss where the security is so reduced in value by the fire as to leave his debt uncovered. (3) This reduced value is the market value of the site and salvage of buildings, and not the value for the purposes of reinstatement, which is in general much greater. (4) Insurance by creditors of their independent interests is not to be treated as double insurance by the owner, in respect that he is made a party to each of the creditors' policies for his reversionary interest.

WILLIAM HARVEY.

A and *B*, two creditors, hold liens to the extent of a and b and insure to the full value of the liens. If d be the damage actually done by the fire to the security, and if $a+b=d+e$, e is the excess recoverable in the hands of the owner by the insurers of *A* and *B*. The sum represented by e falls to be divided between the insurers of *A* and *B* in the proportion of a to b, the sums they have paid in the first instance. *A*'s insurer, on this principle, pays ultimately

$$a-\frac{a}{a+b}e=a-\frac{a}{a+b}(a+b-d)=\frac{a}{a+b}d,$$

which is the amount he would have had to pay originally upon the contribution principle.

SCENES IN COURT FROM THE YEAR BOOKS.

'HOW one would have liked to see one of those ancient Courts under the Plantagenets!' was the remark of Wills J. at a meeting of the Selden Society—on an eyre say at Winchester or Hereford,—the King's Justices, the stout old Sheriff with his posse, the bailiffs, the knights, the jurors, the serjeants of the law 'ware and wise' in their hoods, the appellees and prisoners, and all the motley crowd of suitors and spectators. Where be they all now? They live forgotten in the dusty folios of the Year Books—those Year Books rich with the spoils of time to the student of our legal history, to the ordinary reader an arid waste of legal technicalities. Yet here and there, diversifying the dreariness, we come upon some little green oasis of human interest, a lively wrangle between counsel, a glimpse of national manners, an outbreak of testiness on the part of the Judge, it may be a 'good round mouth-filling oath' such as Queen Elizabeth in her best vein could swear, according to Mr. Froude. A Scotch young lady lamenting her brother's addiction to the bad habit of swearing added apologetically, 'but nae doubt swearing is a great set aff to conversation:' and no doubt swearing from the Bench is very effective at times. So at least the King's Justices thought, for they swear in the Year Books with the force and freedom of Commodore Trunnion. 'Do so in G—'s name,' 'By G— they are not,' 'Go to the devil' (Alez aut grant diable)—this to a bishop—are among the flowers of judicial rhetoric. When Hull J. flew into a passion at the sight of a bond in restraint of trade and swore 'per Dieu si le plaintiff fuit icy, il irra al prison' (2 Hen. V. fo. 5, pl. 26), he was only keeping up the tradition of the Bench. Counsel swear by St. Nicholas, which has an appropriateness of its own (21 & 22 Ed. I. Br. Chr. 31, iv. 480).

> 'A good and virtuous nature may recoil
> In an imperial charge,'

says Shakespeare in 'Macbeth.' The Justices felt they presented the King's person and were naturally inclined to be a little absolute in swearing and laying down the law. Cases did not then embarrass them. 'Never mind your instances,' says Metingham J. to counsel who was citing some previous decision (20 & 21 Ed. I. Br. Chr. 31, iv. 80). Here is a little scene, suggestive of the Court in *Bardell* v. *Pickwick*.

Berriwick J. (to the Sheriff). 'How is it you have attached these

people without warrant? For every suit is commenced by finding pledges, and you have attached though he did not find pledges.'

The Sheriff. 'Sir, it was by your own orders.'

(Mem. by Reporter.) 'If it had not been, the Sheriff would have been grievously amerced. Therefore take heed.' (21 & 22 Ed. I. Br. Chr. 31. iv.)

On another occasion a jury was shuffling, on a question of legitimacy.

Roubery J. (to the Assize). 'You shall tell us in another way how he was next heir, or you shall remain shut up without eating or drinking until to-morrow morning.' (21 & 22 Ed. I. Br. Chr. 31, iv. 272.) This quickly brought the right answer.

Counsel do not escape unscathed.

Hertford J. (to Counsel). 'You do bad service to your client. You only take care to get to an averment. You have pleaded badly.' (21 & 22 Ed. I. Br. Chr. 31, iv. 180.) This must have been trying for poor Mr. Phunky. The following is more racy. In a writ of Monstravit de Compoto, &c., Hampone (counsel) begins in this seemingly inoffensive manner. 'Whereas he supposes by his writ that he has nothing whereby he may be summoned or attached to render this account we tell you that he has assets in T.,' &c.

Hengham J. 'Stop your noise (Lessez vostre noyse) and deliver yourself from this account, and afterwards go to the Chancery and purchase a writ of Deceit, and consider this henceforth as a general rule.' (30 & 31 Ed. I. Br. Chr. 31, v. 6.) Let us hope this last statement was lucid to the practitioner of the day. The words at the beginning certainly seem rude, but perhaps they are only what a counsel of that day calls 'curial words' (paroles de la Court). 'Every word,' he says, 'spoken in Court is not to be taken literally. They are only curial words' (20 & 21 Ed. I. Br. Chr. 31, iii)—a remarkable anticipation of a certain celebrated occasion when the Pickwickian sense of the word 'humbug' was explained.

However, Counsel were able to take care of themselves then as now.

'Sir' (this was the mode of addressing the Court). 'Sir,' says Toudeby, 'we do not think that this deed ought to bind us, inasmuch as it was executed out of England' (at Ghent).

Howard J. 'Answer to the deed.'

Toudeby (counsel). 'We are not bound to do so for the reason aforesaid.'

Hengham J. 'You must answer to the deed, and if you deny it then is it for the Court to see if it can try,' &c.

Toudeby. '*Not so did we learn pleading.*' (30 & 31 Ed. I. Br. Chr. 30, ii. 72.) This probably in an audible aside.

The independence of the Bar is emulated by the Reporters. One Robert was charged with harbouring an outlaw. The outlaw procured a charter of pardon from the King, and Robert contended that this purged his offence. Berriwick J. was like Dr. Johnson: his pistol having missed fire he knocks down his opponent with the butt end of it. 'Robert, pay your fine to the King, for you cannot deny you harboured him, and that was a great trespass against the King,' &c., &c.

'Note, the Justice did this rather for the King's profit than in accordance with the law, for they gave this decision *in terrorem*.' (30 & 31 Ed. I. Br. Chr. 30, i. 506.) Brave reporter! This is better than surreptitiously keeping a drawer like Campbell for Ellenborough's bad law. Later on a reporter—was it the same?—mentions a ruling with approbation as 'correct.'

The proper construction of the Statute of Westminster came in question.

Hengham J. 'Do not gloss the statute. We understand it better than you, for we made it, and it is often seen that one statute extinguishes another.' Often! we should think so. Counsel of course collapsed. Still, the learned judge failed to appreciate the distinction of intention and intendment. The dictum contrasts unfavourably with the modesty of the late Lord Justice James in referring to a previous decision of his own, 'which,' he would say, 'is an authority, though I joined in it.'

Technicality in these early cases is rampant. The rule is, 'Find a flaw, however microscopic, in the writ, and pray for judgment.' In a 'Petit Cape,' Agnys was written instead of Agnes. Asserby (for Agnes) thought thereby to upset the whole process, and he said, 'Sir, he sued the Petit Cape against Agnys, whereas he ought to have sued it against Agnes Judgment of the bad writ.'

Metingham J. 'It is not the fault of the party, but it is the fault of our clerk, and that fault will be amended by us, and so we tell you that the process is sufficiently good, and you are not courteous in speaking in that fashion.'

We find Hengham J. obliged, on another occasion, to observe, 'That is a sophistry, and this place is designed for truth.' (30 & 31 Ed. I. Br. Chr. 31, v. 20.) No applause is recorded however as following this excellent sentiment. Brumpton J. has even to admonish counsel, 'See that there is no deceit in your pleadings.' (30 & 31 Ed. I. Br. Chr. 30, v. 362.) Craftiness in pleading was the order of the day, like the subtleties of the Schoolmen. Indeed Durand, a thirteenth-century writer, recommends advocates to adopt what he calls 'a vulpine simplicity.' 'You have admitted this, God help you,' says the Court on one occasion.

On another, counsel had made a slip in vouching the wrong person.

Robert (on the other side). 'We pray judgment of this bad voucher.'

Warwick (who had made the slip). 'Leave to imparl *for God's sake, Sir.*'

(Mem. by Reporter.) 'He obtained it with difficulty.' (21 & 22 Ed. I. Br. Chr. 31, iv. 492.)

This excited state of counsel was not altogether professional keenness. Amercement was the common consequence of an unsuccessful suit. People are always being amerced for false, that is unfounded claims, sometimes sent to prison. Witness the following sad tale of an attorney. It was a case of a claim to land, and alleged default in attending on a given day. *B*'s attorney held to the default. The Justice asked on what day the default was made. The attorney answered that it was on the first day, and it was found that it was on the second day, and afterwards (one or two or three days afterwards) the attorney came and said that it was on the second day, and he held to the default as before.

Metingham J. 'My fine friend (bel amy), the other day when the worthy man was ready to make his law you said that the default was made on the first day, and afterwards you came and said that the default was made on the second day, and thus you vary in your words and deeds: this Court doth adjudge that you take nothing by your writ, but be in mercy for your false plaint.' (21 & 22 Ed. I. Br. Chr. 31, iv. 460.)

A Prior had hung a thief (who had confessed), and got himself into hot water about it.

Spigournel J. 'Call the Prior.'

The Prior came.

Spigournel J. 'Do you claim infangthef and utfangthef?'

Hunt (counsel). 'Sir, he claims to have infangthef.'

Spigournel J. 'Was the felony committed within the limits of your franchise?'

Hunt. 'No, Sir.'

Spigournel J. 'Where then?'

Hunt. 'Sir, we do not know.'

Spigournel J. 'Now, Sir Prior, do you mean to hold a plea in your Court of a felony committed out of the limits of your franchise, when you claim only infangthef?'

(Counsel for the Prior turned and doubled, but to no purpose.)

Spigournel J. (to the Prior). 'You have well heard how it is recorded that you went to judgment on him who acknowledged himself a felon without presentment by the Coroner who can bear record, whereas your Court is not a Court of record, and this you

cannot deny: attend judgment on Monday.' (30 & 31 Ed. I. Br. Chr. 30, i. 500.)

What befell the unlucky Prior does not appear. The Crown was getting very strict, and rightly, about these franchises.

Default of appearance was a common incident then as now, perhaps commoner, owing to the difficulties of travelling, as the following illustrates. It was a case of a Writ of Right between Roger de Pengerskeke, demandant, and John de Leicester and Joan his wife, tenants. On the day of the return of the writ to cause the four knights to come and choose the Assize, John did not turn up and the default was recorded. 'On the next day John came to the bar and answered for his wife as attorney, and for himself in his own person, and said that the default ought not to hurt him because he was hindered by the rising of the waters.

The demandant's Attorney. "Where were you hindered?"

The Tenant. "At Cesham."

Mallore J. "At what hour of the day?"

The Tenant. "At noon."

The demandant's Attorney. "And we pray judgment if from that time he could be here at the hour of pleading, since it is 15 leagues away from here. Besides he began his journey too late."

The Tenant. "I travelled night and day."

Mallore J. "What did you do when you came to the water and could not pass? Did you raise the hue and cry and the menée, for otherwise the country would have no knowledge of your hindrance?"

The Tenant. "No, Sir. I was not so much acquainted with the law, but I cried and hullooed" (jeo criay e brayay).

The demandant's Attorney. "Judgment outright of his default, and we pray seisin of the land."

Mallore J. "Will you accept the averment that he was hindered as he says?"

The demandant's Attorney. "If you adjudge so, Sir, but since he has admitted that he did not raise the menée, judgment of his admission."

Hengham J. "Keep your days until to-morrow." And on the morrow they were adjourned to the Quinzein of Trinity, which to some seemed strange.' (30 & 31 Ed. I. Br. Chr. 30, v. 122.) Not to us, familiar with the law's delay. But space is limited, and we must drop the curtain.

EDWARD MANSON.

THE DETERMINATION OF THE MOWBRAY ABEYANCE.

SEVERAL points of great interest to the student of Peerage law were raised in the Mowbray and Segrave case decided in 1877. But on the present occasion I do not propose to call attention to more than one—the alleged determination, 'in some way or other,' in favour of the Howard co-heir, of the abeyance into which the baronies of Mowbray and Segrave had fallen in the fifteenth century.

Anne, the child-heiress of the Mowbrays, Dukes of Norfolk, was an infant of six years old at her father's death (1475) and affianced to a son of Edward IV (one of 'the princes in the Tower'), who was thereupon created Duke of Norfolk. She died in tender years, leaving the succession to the baronies and vast estates of her house open to her relatives, Isabel and Margaret, wives respectively of James Lord Berkeley and Sir Robert Howard. Now these ladies were the daughters of the first Duke of Norfolk, son of John Lord Mowbray, by his marriage with the daughter and heir of John Lord Segrave, whose wife Margaret, Countess of Norfolk, was the heiress of Thomas 'de Brotherton,' son of Edward I, and Earl Marshal. Thus the death of the little heiress proved the means of a vast accession to the fortunes of the house of Berkeley, while it virtually founded those of the house of Howard. The Mowbray dignities were divided between them, Lord Berkeley being created Earl of Nottingham and Lord Howard Duke of Norfolk the same day (June 28, 1483). It is a singular circumstance that the seniority of the heiresses seems to be undetermined, Ulster declaring Lady Howard to be the elder, while the *Complete Peerage* of G. E. C. assigns that position to Lady Berkeley, as, apparently, did Dugdale. But in any case the Berkeleys had an equal share in the representation of this illustrious line, which makes it the more strange that the Howards should have been tacitly allowed to monopolize it as they virtually have done. In 1777 this representation, with all that it involved, passed away from the Howards to their heirs-general, the Lords Stourton and Petre; and in 1882 the share of the Berkeleys similarly passed to their heir-general Mrs. Milman, now recognized as Baroness Berkeley. Thus, in 1877, there were three co-heirs to the house of Mowbray, namely the *de jure* Earl of Berkeley (whose right to that title has been confirmed by the recent decision, but

who never assumed it), who inherited one moiety, and the Lords Stourton and Petre, who shared the other. The Committee for Privileges decided, however, that the abeyance of the Mowbray and Segrave baronies had been determined in favour of the Howards 'previously to the reign of Queen Elizabeth,' and believed that it was done by Richard III.

The first point in this decision that invites close attention is its bearing on the doctrine of abeyance. The best authorities have agreed in placing the earliest undoubted case of the determination of an abeyance by the Crown so late as 1660, the previous cases being all more or less doubtful. The Mowbray decision, however, carried back the practice *per saltum* to the days of Richard III! But far more extraordinary, and indeed revolutionary, was the view taken of the evidence in proof of the abeyance being determined in favour of the Howard co-heir. In the Windsor case (1660) the determination was effected by formal patent, but in that of Ferrers of Chartley (1677) merely by the issue of the writ, which has since been the usual practice. But in the Mowbray case there is no evidence how or even when the abeyance was determined.

Down to the time of Lord Stourton's claim the position of the question was this. The barony of *Segrave* (though the Berkeleys had constantly included it among their titles) was believed to be still in abeyance. Mr. Fleming, Lord Stourton's own counsel, had himself admitted in the Scales case (p. 26) that the barony of Segrave is in abeyance 'between Lords Stourton and Petre . . . and the heir of the late Earl of Berkeley.' So universal was this belief that a modern barony of Segrave was created in favour of the Fitzhardinge Berkeleys (1831). As to *Mowbray*, there were doubts. Mr. Courthope, in his *Historic Peerage* (1857), referring to the Mowbray summons of 1640, held that 'it may reasonably be doubted whether this writ of summons did not create a new barony instead of affecting the abeyance of the ancient dignity' (p. 340). But, in any case, no other evidence than this writ, for the determination of the abeyance, was supposed to exist. In Lord Stourton's original petition it was accordingly claimed 'that the Barony of Mowbray continued in abeyance . . . until the year 1640, when King Charles the First was pleased to determine the abeyance by summoning Henry Frederick Howard . . . as Lord Mowbray.' This allegation, of course, ignored the difficulty that the party to whom the writ was issued was not a co-heir to the dignity at the time.

The claim, however, was subsequently altered in consequence of the discovery of Letters-missive from Richard III, including the baronies of Mowbray and Segrave in the Duke's style. In Lord

Stourton's 'additional case' it was confidently urged by his counsel that these Letters proved the determination of the abeyance[1].

These Letters, on which Mr. Fleming insisted so strenuously throughout, were, with singular eagerness, accepted as proof by the Committee. I append the relevant extracts from their judgment:—

LORD CHANCELLOR.

'As to the abeyance of the Segrave barony, it appears to me that the Letters-missive of the 2nd of Richard III, signed by the King, would of itself be sufficient evidence that in some way or other the abeyance had been terminated by the Sovereign.'

LORD O'HAGAN.

'As to the abeyance, I should say that the Letters-missive of King Richard III are of themselves, without any question being raised as to the admissibility of the garter-plates in evidence, quite sufficient to prove the determination of the abeyance of the baronies. The King recognizes the determination of the abeyance; . . . and however it may have been accomplished . . . I think the evidence with regard to the determination of the abeyance of the baronies is perfectly sufficient.'

LORD BLACKBURN.

'If it [the determination] is done by a document, under the hand of a Sovereign, by his sign manual, that is quite sufficient. Now here is evidence that the abeyance was so terminated. . . . I think myself, if it were necessary, it [the Letters-missive] should be construed as operating as an original grant under his hand to determine the abeyance; for I am not aware that the King could do more. . . . I think the Letters-missive of King Richard III are quite conclusive upon the matter.'

LORD CHANCELLOR.

'I myself do not accept that [the garter-plates] as evidence with regard to the determination of the abeyance, but I think the other evidence of the determination of the abeyance is satisfactory, namely the Letters-missive of King Richard III.'

These extracts sufficiently establish the Committee's acceptance of Mr. Fleming's contention that 'the abeyance of the baronies . . . was determined in favour of John Howard, the first Duke of Norfolk[2],' and that this determination, proved by the Letters-missive, 'forms the sole ground[3]' for the subsequent user of the titles.

Let us first consider the consequences of the principle thus laid down. It revolutionizes the doctrine of abeyance, as hitherto

[1] See Additional Case, No. 27 (p. 9), and the note thereupon:—'It is confidently submitted on the part of the Petitioner that the abeyance . . . was determined in favour of John Lord Howard Duke of Norfolk shortly after her [Anne's] death, and before the 24th of September, 1484 [the date of the Letters-missive].'

[2] Special Case, p. 290.

[3] Ibid., p. 26.

understood, in the direction aimed at by Mr. Fleming in the Scales case, and thus opened the door to a new series of claims. The Leicester patent of 1784, for instance, can now be invoked as determining (or proving the determination of) the Bourchier abeyance; and other recognitions by the Crown in formal instruments, however erroneous, can now be similarly interpreted.

Incidentally, it may here be added that, according to Lord Stourton's 'original case' (p. 11), the Duke of Norfolk received, Feb. 24, 148⅔, a general pardon 'describing him by all the titles and names which could be attributed to him,' but the Pardon Roll reveals that the baronies of Mowbray and Segrave are not to be found among them. So too with his patent of creation on June 28 preceding. This then narrows the date of the alleged determination to February—September 1484. And though the time and manner of such determination, at this very early date, should have been clearly established, we have only the Lord Chancellor's belief that it took place 'in some way or other' on some unknown occasion.

Assuming, however, that Mr. Fleming was right, and that, in the words of the petitioner's case, 'the abeyance . . . was determined in favour of John Howard Duke of Norfolk previously to the 24th of September,' 1484, what evidence is there of the user of the titles by the Howards? The petitioner was not able to adduce one till 1563, when the funeral certificate of the Duchess of Norfolk styles her husband 'Lorde Mowbray Segrave and of Brews' (p. 265). And this was dismissed, in his judgment, by Lord Blackburn (who oddly seems to have imagined that it was a coffin-plate inscription [1]) as 'no evidence at all.' With that exception the petitioner adduced no evidence of user till the garter-plate of 1611 (p. 265). Now what is the cause of this hiatus?

Assuming, as I have said, that the baronies of Mowbray and Segrave were duly vested in John Duke of Norfolk (d. 1485), they were obviously forfeited by the Act of Attainder in 1 Hen. VII (p. 135). Of this there can be no question. Now the act of 'restitucion' in favour of his son 'Thomas late erle of Surrey' (4 Hen. VII) expressly stipulates 'that this statute of adnullacion and restitucion *extend not to the said Thomas to eny honour estate name and dignite but onely to the honour estate name and dignite of Erle of Surrey*' (p. 140) [2]. This would obviously exclude the baronies of Mowbray and Segrave as well as that of Howard and the Dukedom of Norfolk. Accordingly when this Thomas Howard was created Earl Marshal (2 Hen. VIII) and Duke of Norfolk (5 Hen. VIII)

[1] 'The mere fact that a Duke of Norfolk put upon his Duchess' coffin-plate a statement that she was the wife of the Lord Mowbray and Segrave is no evidence at all.'

[2] Naturally enough, these words are not those italicized in the Minutes of evidence.

he was only styled Earl of Surrey and had no baronies assigned him. Now the subsequent attainders of the house and their reversals could do no more than place its heads eventually in the shoes of this Thomas. It is to me utterly inexplicable how this objection can have been overlooked, except on the hypothesis, surely inadmissible, that the fatal words in the Act restoring the Earl of Surrey escaped notice.

If, then, the abeyance was determined under Richard III, the baronies were forfeited by attainder and have remained so ever since.

The actual resolution, however, adopted by the Committee did not pledge them (in spite of their *rationes decidendi*) to a determination in or before Sept. 1484. Although it was avowedly on this that their decision was based, they illogically resolved—*ob majorem cautelam* we may presume—that the abeyance was determined 'previously to the reign of Queen Elizabeth.'

Now, either the abeyance was determined previously to Sept. 24, 1484, or it was not. If it was not, then the earliest proof of that determination accepted by the Committee is the Act of 1604, which implied, according to the construction placed upon it by the petitioner, that the baronies must have been vested in Duke Thomas at his attainder (1572); that is to say, the abeyance was determined previous to 1572. But what is the proof that it was determined 'previously to *the reign of Queen Elizabeth*' (i.e. to 1558)? Absolutely none was given [1]!

Adopting, then, this hypothesis, it is clearly far more difficult to assume the determination of an abeyance at this comparatively late epoch than it would be under Richard III, a period relatively obscure. Moreover, in this case there is no such evidence as was afforded even by the Letters-missive of 1484. We are therefore, admittedly, dependent on a retrospective induction from the Act of 1604. And to this I propose now to address myself.

The words relied on by the claimant were:—

'To the Honour, State, and Dignitie of Erle of Surrey and to *such dignitie of baronies only* which the said late Duke of Norfolk forfeited and lost by the said attainder.'

The word 'only' has been understood as excluding any claim to the Duke's *territorial* 'baronies.' But, in any case, these guarded words could not do more than restore to the Earl such baronies as he could prove to have been vested in the late Duke. They were not, and did not profess to be, a determination of abeyance, nor did

[1] This extraordinary expression may have originated in the petitioner's claim (Additional Case, p. 27) that the baronies 'were vested in the reign of Elizabeth in Thomas . . . Duke of Norfolk,' a loose expression which is by no means equivalent to 'at the accession of Elizabeth.'

they even name a single barony. It was urged by counsel that the only baronies they could refer to were those he claimed, which must, therefore, have been vested in the Duke. But I reply, firstly, that they do not name any baronies as vested in the Duke; secondly, that even if they had, the recognition of a wrongful assumption could not operate as a creation or even a determination of abeyance.

The assumption of dignities was an ancient practice. In the early days of the Tudors, Lady Hungerford, who held three baronies, took the styles of six, two of them not genuine and one in abeyance. The Earls of Northumberland assumed the baronies of FitzPayne and Bryan, to neither of which had they any right. In the 16th century the Radcliffes, Earls of Sussex, successively assumed the baronies of Egremont and Burnel, though (Multon of) Egremont was in abeyance and Burnel also. So too, though the barony of Latimer fell into abeyance in 1577, two of its four co-heirs, the Earls of Danby and Northumberland, coolly assumed it *temp.* Charles I (as was pointed out in the Fitzwalter case), and even had it assigned to them on their garter-plates at Windsor [1]. And this brings us to the very reign when the similar wrongful assumption of Mowbray was recognized (we hold) in error by the Crown.

For that the Crown did so err we now proceed to show. An armorial decision of the Court of Chivalry in 1410 induced the then Lord Grey de Ruthyn to assume the baronies of Hastings and 'Weysford' [Wexford], and both these titles were duly assigned by the Crown to his heir when he was created Earl of Kent, 1465 (and in 1484, 1486). Yet 'Weysford' was a fancy title and Hastings one to which the Longueville decision (1640) proved the family had no right. So retentive were the Greys of their 'plumes,' that, as G. E. C. reminds us, they 'clung tenaciously to the barony of Grey de Ruthyn' even after their heir-general had proved his right to it and taken his seat. More striking, however, are the assumptions of the Devereux family and their heirs. Walter Devereux, Earl of Essex (d. 1576), assumed among his styles the Earldom of 'Ewe,' the Viscountcy of Bourchier, and the Barony of Lovayne: the first was a Norman Countship extinct since 1539, the second also an extinct dignity, and the third a fancy title. Now my point is that these titles, wrongfully assumed though they were, were recognized *nominatim*, in the Devereux Act of Restoration

[1] It was aptly observed by Lord Redesdale (who seems to have known his business better than the Law Lords) :—'You show that there were co-heirs of the barony of Mowbray; you show that an individual assumed the title; . . . but there is no proof of the abeyance being determined' (Proceedings, pp. 14–15).

(1604), as having been 'lawfully and rightly' held by the Earls of Essex! This, as will be seen, is evidence far stronger than that of the Howard Restoration Act, in the very same year (1604), which vaguely speaks of 'such dignitie of Baronies' as the Howards may have lost by the attainder of 1572. And yet this latter Act was actually treated as a sheet-anchor in 1877, and accepted as conclusive proof that the baronies of Mowbray and Segrave, which were not even mentioned by name, must have been lawfully vested in the Duke who was attainted in 1572!

To any one conversant with the practice in such matters the worthlessness of such evidence needs no demonstration.

We have now seen that, if the claim based on the Letters-missive of Richard III be abandoned, the case stands thus:—The abeyance must have been determined after the restoration of 1489 and before the attainder of 1572, but nothing is known as to how, or even when, it was done, while the only ground for supposing that it was ever done at all is an Act of Parliament at a later period, which does not state that the abeyance was determined, and does not even name the baronies in question.

So little was the supposed determination suspected at the time that the Lords Berkeley styled themselves Lords Mowbray and Segrave constantly from 1488 to 1698, a fact which counsel, of course, kept carefully out of sight. For Mr. Fleming's argument was that all such assumptions were valid; and yet, if this one was so, there was at once an end of his case.

The view that I shall myself advance removes every difficulty. The Mowbray summons of 1640 is, I hold, exactly parallel with the Strange and Clifford summonses of 1628. All these were issued in error. It can be shown that great nobles were in the habit of annexing minor titles in the most casual manner; and that the Crown, in this matter, so far took them at their own valuation as to allow them, in most formal documents, these ornamental appendices. Of this there are most curious examples, although they are little known. The strange doctrine that an earldom (in tail male) 'attracts' a barony (in fee) was advanced in the cases of Roos (1666)—now De Ros—and Fitzwalter (1668), but was disposed of by the judges in the latter. One of the arguments for it was that, otherwise, ancient earldoms 'should lose the plumes of their honour.' This happily expresses the spirit of those great nobles who decked themselves with such plumes, too often 'borrowed plumes,' either by inventing baronies which had no existence, or by retaining those which should have passed to heirs-general. Sometimes they did both. Thus in the case of the Earldom of Oxford (1626) the judges held that the baronies of 'Bulbeck, Sandford, and Badlesmere'

had passed away to heirs-general a century before, but that five earls, in succession, had since 'assumed these titles nominally in all their leases and conveyances, and the eldest son [is] called still by the name of Lord Bulbeck.' But modern research has further shown that 'Bulbeck and Sandford' had never even existed as peerage baronies, while Badlesmere was in abeyance, an abeyance determined by the earls themselves in their own favour, as was that of Mowbray (I hold) by the Howards. So, too, the Howards in 1627, foisted upon the Crown 'the titles and dignities of the baronies of Fitz-alan, Clun and Oswaldestre, and Maltravers,' which they employed, though it is admitted that Maltravers alone was a genuine peerage barony. The Crown was actually induced not only to recognize them all (to the eternal confusion of peerage students), but to wrench them from their natural descent and entail them, together with the earldom and castle of Arundel, on the Howards by a special Act of Parliament. The same Act recognized by its preamble the pretension that Arundel was an earldom by tenure, though our better knowledge of history has shown the absurdity of the claim. Thus these baronies were made, by violence, to 'attend' the earldom, much as James I, in 1620, by a similar stretch of the prerogative, had annexed the barony of Offaley to the earldom of Kildare.

The best known and latest instance of erroneous recognition by the Crown is the patent of creation for the earldom of Leicester in 1784. In this instrument three baronies were recognized as vesting in the Earl, to none of which he could prove a right.

From such recognitions it was but a step to summoning the son and heir of an Earl in a barony to which his father was supposed to be entitled. This was actually done, by universal admission, in the case of the Earl of Derby's son, summoned as Lord Strange in 1628, though the Earls, since 1594, had not been entitled to that barony, as also in that of the Earl of Cumberland's son, summoned in 1628 as Lord Clifford, though that barony had passed away from the earldom in 1605. It was again done in 1722, when a summons in the barony of Percy was issued in error. In all three cases the result of this error was, admittedly, the creation of a wholly new barony. My contention is that the Mowbray summons of 1640 was an error precisely similar. And as for the admission of the original precedence, it was similarly admitted in the case of Percy.

To recapitulate, I claim to have shown :—

(1) That the words of the Resolution, 'previously to the reign of Queen Elizabeth' (i.e. to 1558), are merely a careless blunder ; and that what was meant was 'previously to' the death of Thomas Duke of Norfolk (i.e. to 1572) who lived in the reign of Elizabeth.

(2) That the Letters-missive of Richard III were vouched by the petitioner as the proof of the determination of the abeyance (before their date).

(3) That if the abeyance was then determined, the baronies of Mowbray and Segrave are now under attainder.

(4) That the determination of the abeyance previous to Sept. 1484 must therefore be abandoned as a *ratio decidendi*, and the Resolution be construed as asserting a determination between 1489 and 1572.

(5) That of such determination there is no proof, petitioner having vouched the Letters-missive as the 'sole ground' for the user of the titles, and the Committee having deemed them essential to his case.

The moral, surely, is obvious enough. If peerage claims are to be thus decided on *ex parte* evidence, the most fatal flaws in the petitioner's case may, as on this occasion, pass undetected.

J. H. ROUND.

NOTE.—Since this article was written, the arguments in the Howard of Walden case (1691–2) have been made more accessible by the publication of a House of Lords MS.[1] They are important as showing that, even at this late date, it was urged on behalf of the Earl of Suffolk (heir-male) by his counsel, Mr. (afterwards Chief Baron) Ward and Mr. Wallop that the barony was vested in him, not in the heirs-general (in spite of the 1668 decision *ut supra*). For this they relied *inter alia* on the Strange and Clifford cases (1628) in which, as we now hold, the titles were recognized in error. Failing this, they urged that the Barony was wholly at the king's disposal, without preference to the heirs-general over the heirs-male. For this view their precedent was the case of the Earldom of Oxford (1626), 'in which case it was decided that the baronies were at the king's disposal[2].' The precedents put in on behalf of the Earl of Suffolk, and certified by Windsor Herald, confirm further my statements as to the assumption of dignities. Of these, the two most important for my purpose are:—

(1) Derby.—In this case, on the death of Ferdinand, Earl of Derby (1594), the baronies vested in him are held to have fallen into abeyance between his three daughters.

[1] Thirteenth Report on Historical MSS. App. V. pp. 479–489.

[2] The judges had only reported that 'they, in strictness of law reverted to, and were in the disposition of King Henry the Eighth.' But the House resolved that (according to the judges) 'the baronies of Bolbecke, Sanford, and Badlesmere are in His Majesty's disposition' (Lords' Journals, III. 537), March 22, 1625–6, and certified the king (April 5) that 'they are wholly in your Majesty's hand, to dispose at your own pleasure' (p. 552).

'The Baronies, notwithstanding, were used and enjoyed by William, Earl of Derby, brother and heir-male to the said Ferdinand, and being chosen Knight of the Garter (at his installation, according to custom), the said William's titles and stile were proclaimed in the presence of Queen Elizabeth in 1601, which were William Stanley, Earl of Derby, Lord Stanley, Strange of Knocking and of the Isle of Man, and were also engraven upon his plate under his arms at the back of his stall, and continue still [1692] to be used by the present Earl of Derby, without the least dispute, which we do esteem a good precedent.'

(2) Oxford.—In this case the judges had reported (1626) that the three baronies (*vide supra*, p. 75) 'descended to the general heirs of John, the fourth Earl of Oxford' in 1526.

'The Baronies, notwithstanding, accompanied the Earldom, and Aubrey de Vere, the present Earl of Oxford, when installed Knight of the Garter [1660], with the title of Earl of Oxford were (*sic*) also proclaimed his baronies of Bolebec, Sandford, and Badlesmere in the presence of the king, and are also engraven upon his plate at the back of his stall at Windsor, which we do esteem also a precedent.'

These cases have a grave bearing on the admissibility of garter-plates in evidence (cf. *supra*, p. 73). Considerable stress was laid on their testimony in the Mowbray case itself; but if that of the Letters-missive must now be abandoned, a garter-plate will not be found an efficient substitute.

J. H. R.

THE NEW RULES OF THE SUPREME COURT.

(Nov. 1, 1893.)

IN June 1892, the Council of Judges assembled for the purpose of examining into any defects which might exist in the system of procedure under the Rules of the Supreme Court, &c. &c., in pursuance of the 75th Section of the Judicature Act 1873.

In July of the same year they reported to the Secretary of State that it would in their judgment be expedient to make such amendments in the Judicature Act, and otherwise, as might be necessary for giving effect to the Resolutions which they enclosed in the Report.

Thereupon the Bar Committee, the Incorporated Law Society, and Mr. Justice Cave proceeded to consider and criticize the Report and Resolutions of the Council. The Lord Chancellor put forth his views upon them in the shape of a Memorandum; a 'Member of the Bench,' in a couple of articles in the Times (9th and 10th August, 1892), gave a popular sketch of the subject, and the rank and file of the profession expressed their views and their feelings in the columns of the legal and other Journals.

There were certain special points upon which controversy became acute, and around which it centred.

It is proposed in this article to consider these principal matters, and to see how far they have been dealt with by the Rule Committee in the final stage of the proceedings which has now been reached.

Circuits.—The grouping or centres of country civil causes was, in the opinion of the Council, the most valuable part of the proposed reform, without which all the other alterations suggested would have but little effect.

But this part of the scheme did not meet with the approval of the Lord Chancellor, or of Mr. Justice Cave, or of the profession, and the Resolutions of the Council (Res. 1–10) have not been acted upon either by the Rule Committee or otherwise, save so far as the subject may be affected by the Order in Council of July 28, 1893.

Summons for Directions.—A *compulsory* summons for directions was strongly favoured by the Council (see Report and Resolutions, 11–18), following the recommendation of the very strong Committee of 1881, which consisted of Coleridge C.J., James L.J., Sir J. Hannen, Bowen L.J., Lord Shand, Matthew J., Sir H. James, Sir F. Herschell, and Messrs. Reid, Hollams and Harrison. But

the Lord Chancellor felt that the objection entertained by a large section of the Bar, and by solicitors without exception, to a *compulsory* summons rendered it very doubtful whether such Resolutions should be persevered with. The Bar Committee, the Incorporated Law Society, and Mr. Justice Cave were also strongly against the proposal, and in the result the Rule Committee, whilst enlarging the Order (O. 30) in some important respects (see 'Pleadings,' *infra*), have limited the application of this summons to cases not specially assigned to the Chancery Division, and have left the issuing of such a summons *optional*, as it was before (O. 30).

Pleadings.—The Council considered that no pleading should be made without an order (Res. 14), and the Lord Chancellor was of the same opinion. On the other hand, the Incorporated Law Society and Mr. Justice Cave insisted that pleadings could not be safely abolished. The Rule Committee have taken a middle course by providing (O. 18 A) that a *plaintiff* may, without pleadings, proceed to trial, subject however to the possibility of a judge making an order, on the application of the defendant, that a statement of claim shall be delivered. This is an amplification of the existing procedure under O. 34, r. 9. But in an action, in a matter *not* assigned to the Chancery Division, it would appear that *any party* (see definition J. A. 1873, s. 100) thereto, may by applying for a summons for direction (O. 30, r. 1) throw the whole question as to whether these are to be pleadings or not, under the jurisdiction of the Court. For on the hearing of such a summons the judge *shall* make an order with respect to *pleading*, &c. (O. 30, r. 2). The net result seems to be that the plaintiff *in any action* may go to trial without pleading subject to the possibility of an order to plead being made against him, and that any 'party' (see definition J. A. 1873, s. 100) to an *action not specially assigned* to the Chancery Division, may by a summons for directions bring the question of pleading or no pleading under the jurisdiction of the judge.

Discovery.—The Council thought that discovery both by interrogatories and by affidavit of documents should be allowed only when they appeared to be necessary for the fair trial of the cause or for the saving of costs (Res. 19, 20). The Lord Chancellor agreed. The Incorporated Law Society and Mr. Justice Cave were of opinion that the right to discovery should be unrestricted, but that the abuse of it should be punished with costs, whilst the Bar Committee adhered to the views expressed in their Report of June 1891, to the effect that the power of using interrogatories should be more effectively controlled, that particulars in the pleadings (O. 19, r. 6) should be insisted upon, that the parties should be enabled to claim

by endorsement of the pleadings the usual affidavit of documents, and that the deposit required by O. 31, r. 26, should be abolished.

The Rule Committee have substantially followed the Resolution of the Council of Judges. Interrogatories can now only be delivered *by leave*, and the interrogatories proposed to be delivered are to be submitted to the Court or a Judge. Any party may apply, without any affidavit, for an order for discovery of documents, and inspection of particular documents may be ordered upon an affidavit showing of what document inspection is sought, and that they are in the power of the other party (O. 31, rr. 2, 12, 18). But r. 26 of 31, requiring a deposit to be made, is retained unaltered.

The Council also recommended that in the case of business books, inspection should be replaced by an affidavit and by extracts or copies (Res. 21). This Resolution, although not approved by the Bar Committee, is carried into effect by O. 31, r. 19 A.

Originating Summonses.—The Council thought that originating summonses should be extended to all cases of construction of written instruments (Res. 64–66). The Lord Chancellor, the Bar Committee, the I. L. Society concurred. Mr. Justice Cave, however, saw no necessity for this, but thought that the ordinary writ of summons, with provision for its proper endorsement, and an extension of O. 14 was all that was necessary. The writer ventured, in the interests of simplicity and uniformity, strongly to support this view in a paper which appeared in the REVIEW for January, 1893. However, it is now provided that '*in any division* of the High Court any person claiming to be interested under a deed, *will*, or other written instrument may apply by originating summons for the determination of *any question of construction* arising under the instrument, and for a declaration of the rights of persons interested' (O. 54 A). These summonses moreover, or notice of them, may now be served out of the jurisdiction (O. 11, 2), and the former rules relating to them when they were available, in the Chancery Division only (O. 55, rr. 20–23), are now cancelled, as also the old form of summons (App. L, No. 25), and new rules (O. 54, rr. 4 B, C, D) and new forms (App. K, No. 1 A–1 F) are substituted.

The principle of enabling persons to obtain the opinion of a competent tribunal upon questions arising on the construction of written instrument in a cheap and summary manner is excellent. But the benefit conferred by this new rule would, it is submitted, have been much greater if care had been taken to make the practice under it absolutely plain and simple, by clearing away the doubts and difficulties with which the imperfection of the Rules and the ingenuity of the legal mind have incumbered this Procedure. To members of the Chancery Bar and to Chancery officials, whose

natural acuteness of mind has been abnormally developed by a long course of Chancery practice, the 'loose conglomerate' of the R. S. C. presents but little difficulty.

But originating summonses are no longer a speciality of the Chancery Division, but may be used in *all* the divisions. And to practitioners in the Q. B.D., to country solicitors and managing clerks, every unnecessary subtlety of procedure is a grievous burden.

Let us imagine then a practitioner *not* in the Chancery Division confronted by the new forms of originating summons in Appendix K, No. 1 A, No. 1 B, and endeavouring, by the light afforded by the Rules and his own intelligence, to find out what they mean.

The first (No. 1 A) he finds is similar to the old form (App. L, No. 25) except that it partakes more of the peremptory character of a writ, and about this form he has little difficulty. Then he proceeds to consider No. 1 B which is headed 'Originating summons *not* "inter partes" (Order LIV, rule 4 B).'

This he thinks to himself must be some new kind of 'ex parte' summons. But on looking a little further into the forms he finds that a person called therein a '*respondent*' is to be '*served*' and is to *appear*, and that in default of appearance an order may be made against him. This puzzles our practitioner *not* in the C.D., for he knows his practice well enough to know that the definition of a 'party' includes every person *served with notice of a proceeding*. But here there is a person served, but who nevertheless is not a party because the form says it is a summons *not* 'inter partes,' which means so far as his scholarship goes, a summons *not* between *parties*. Then he remembers further that every originating summons as constituted by the rules of 1883, and presumably by those rules is an 'action.' So it seems to him that he has learnt that an action may now be commenced without any parties—an 'ex parte' action in fact—and that is a novelty to him. Stimulated by the acquisition of new ideas he proceeds further in his investigation. He notes the heading 'In the matter of the trustee of the will of A.B. and in the matter of the Trustee Act, 1893 (or as the case may be).' Clearly then he thinks this being the form of an Originating summons, it is intended by this heading to show that such a summons may be used in applications under the Trustee Act, 1893. He turns to his new rules under that Act, and he finds 'all applications under the Act may be made by petition except,' &c., &c., and that 'all the following applications under the Trustee Act, 1893, may be made by *summons*' (O. 55, r. 13 A). By summons! But the form he is considering is an '*originating* summons,' the creature of the rules of 1883 and 1893, and he has always understood that there is a thin but

substantial distinction between a summons under an Act of Parliament originating procedure, and an Originating summons as constituted by the rules. The latter, he remembers, constitutes an 'action,' *Re Fawsitt*, 30 C. D. 231. The former is a summons 'in a matter not being an action.' The time for appealing from an order in the one case differs from that in the other. This distinction he now infers has now disappeared, and the word 'summons' (O. 55, r. 13 A) and 'Originating summons' (R. S. C. Charitable Trusts Act, 1891) henceforth mean the same thing.

Whether our practitioner is correct in his inference is a question for the solution of which his client will probably have to pay.

Continuing his examination further he observes that both in No. 1 A and in No. 1 B the defendant in the one case and the 'respondent' in the other is told that he '*may*' appear thereto, &c. Now he knows on the authority of Cotton L.J. and his grammar, that this word is potential, and that it can never mean 'must' or 'shall.' He turns to his rules, O. 54, r. 4 C, and reads, 'The parties served, &c., "*shall*" enter an appearance.' Somewhat shaken he reads on. Appearances, say these forms, may be entered 'at the Central Office,' the situation of which is described with precision. Another glance at O. 54, r. 4 C and he sees that they must be entered at the Central Office, *or in Admiralty matters at the Admiralty Registry*, the situation of which is evidently known far better than that of the Central Office as no attempt is made to describe it.

The presumption of course is that the Rules and Forms are correctly and properly drawn, and that it is only the want of knowledge or of intelligence on the part of the practitioners that causes any difficulty. Any chief clerk would explain to our practitioner that a summons, *not* 'inter partes,' is a well-known term of art, and signifies a summons *to which there is no record, not* a summons to which *no parties* appear. It is true that to a comparatively few persons these words *not* 'inter partes' would convey this meaning. But the point is that to the great body of practitioners, to whom for the first time this procedure is extended, they will seem to mean what in fact they say, and will cause needless trouble. The distinction between *Originating Summonses*, which are the creatures of the R. S. C., and Summonses *originating procedure*, which are the creatures of various Acts of Parliament, has, in fact, become confused, although in many points it is of much practical importance (see for instance O. 58, r. 9 (n), 'Any other matter,' &c., A. P. 1894, p. 1028). But this matter cannot be dealt with in this article.

Leaving these little peculiarities, however, and looking at the new practice of originating summons broadly, it seems probable that one effect of O. 54 A will be that the equitable jurisdiction of con-

struing wills, practically reserved to the Chancery Division by O. 55, r. 3 (g), is now extended, so that all Divisions of the High Court, including the Probate Division, will now become 'Courts of Construction.'

Possibly also questions of Construction arising between Vendors and Purchasers will now be determinable by all Divisions, and not by the Chancery Division alone. See Vendors and Purchasers Act, 1874, s. 9. One other small question presents itself, does the direction given by the Judges of the Chancery Division as to lodging Certificate before sealing of an originating summons (see An. Pr. 1894, p. 978) fall to the ground with the repeal of O. 55, r. 21, or is it to be extended to all Divisions?

Pending business.—By the J. A. 1873, ss. 22 & 42, provision was made as to the application of the Rules in the Schedule to 'pending business.' In like manner the headnote to the R. S. C., 1883, provides that the Rules shall apply, unless otherwise provided to all proceedings taken on or after the day upon which the Rules came into operation. Do these Rules of 1893 apply to such business; are they to have a retrospective operation? The better opinion seems to be that they do so apply. These Rules form part of the new Code of 1883, and may be cited with reference to them (R. 32), and the general principle is that all alterations in procedure are retrospective, see Maxwell on the Interpretation of Statutes, 2nd ed. pp. 271, 273.

Arrangement.—Having regard to the statement in the memorandum issued by the Lord Chancellor, that he has directed a draft consolidation of all the Rules to be made complete as soon as these amending Rules have been settled, this is not a matter of great importance, but a few remarks upon the subject may not be out of place. As the Rules are at present drawn there are certain well-known orders which deal with such subjects as Appearance (O. 12), Default of Appearance (O. 13), Amendment (O. 28), &c. A practitioner in search of information on any of these subjects with reference to any particular process, naturally, as the matter stands at present, turns to these particular orders. If, for instance, he wishes to ascertain the procedure in default of appearance to an originating summons he would naturally turn to the Order on Default of Appearance (O. 13). And he would not be disappointed, for under O. 13, r. 15 he would find what he wanted. But if, acting on the same principle, he were to turn to O. 12 (Appearance) to find out how he should enter an appearance to such a summons, he would find nothing on the subject; that matter being dealt with under O. 54, r. 4 C. So, again, the amendment of an indorsement of a writ, special or otherwise, is dealt with under O. 28, rr. 1 and 2. But

the new rule as to amending a writ specially indorsed is dealt with under O. 14, r. 1 (b). And, it is submitted, that O. 18 A would be more appropriately placed under one of the subdivisions of O. 36.

Other matters.—Other points of practice affected by the new Rules such as the extension of O. 11 (Service out of the Jurisdiction) to other process than writs of summons or notice of writs of summons (O. 11); the shortening of the time for final appeals, O. 58, r. 15; the costs of unsuccessful claims and of inquiries as to legacies, &c. (Res. 75, 77, O. 65, rr. 14 A–14 C), do not call for special notice as they are matters upon which everyone was agreed and are likely to be absolutely beneficial.

The Authorities and Books of Practice.—Books of Practice are the principal channels by which information as to the practice and procedure of the Supreme Court reaches the great body of practitioners. It is very essential for their use and convenience that such books should contain the latest information in the most convenient form.

The authorities, it may be taken for granted, would, in the interests of the profession and of the public, desire that all changes in procedure should be brought to the knowledge of practitioners as quickly and as conveniently as possible. It is therefore respectfully submitted to them, that it would be very beneficial to all concerned if they would cause a notice of their intention to issue new Rules to be sent to the legal journals some two months or so before such intention is to be carried into effect, so that the publication of such books might, in the interests of perfection, be temporarily postponed.

THOMAS SNOW.

REVIEWS AND NOTICES.

[Short notices do not necessarily exclude fuller review hereafter.]

A Treatise on the Law of Quasi-Contracts. By WILLIAM A. KEENER. New York: Baker, Voorhis & Co. 1893. 8vo. xxxii and 470 pp.

MR. KEENER has done a useful work in putting together the rules which govern the sort of obligation called Quasi-Contract. The name itself has a makeshift air, and is on the face of it a confession of juristic failure. It is hard to find any common ground or character for obligations so miscellaneous as those which are included under this one name. They were strung together by the pleader's art, and by a general application to them of the common counts, which conferred on them an outward and artificial semblance of contract. Thus they escaped a separate analysis and classification; and thus they figured for a while in books on contract as the 'contract implied in law,' and more recently have been ejected from the region of contract into a sort of limbo of obligations which spring neither from agreement nor from wrong.

If Mr. Keener had done no more than set out the incongruous group of liabilities which are held together by a common name he would have done good service to the student. But he has done a good deal more than this. He has established very clearly the distinction between the contract inferred from words or conduct, and the so-called contract implied in law, and he has given us a full and interesting account of the various obligations with which he has to deal. Starting with the principle that, apart from obligations arising by way of record or from the imposition of a statutory duty, quasi-contract rests on the doctrine 'that no man shall be allowed to enrich himself unjustly at the expense of another,' he works out the liabilities which the Courts have created in trying to give effect to this doctrine.

It may be owing to the very elastic nature of the doctrine which Mr. Keener takes as his starting-point that he is led to extend his topic so as in places to encroach on the domain of contract. Thus he places under the head of quasi-contract the liability of an infant for necessaries (p. 21); the liability to pay a *quantum meruit* where something has been done under a contract which is afterwards broken and discharged by the fault of the defendant (p. 309); the liability to indemnify an agent against charges not specified but contemplated in the contract of employment (p. 398). All these spring from agreement, and their introduction into the law of quasi-contract revives to some extent the confusion from which we are only just emerging.

Nor is the terminology always unexceptionable. The words 'Waiver of Tort' are not a satisfactory description of the subject which the chapter

thus headed contains. The remedy in assumpsit, as an alternative to the remedy in tort, which was open to the plaintiff whose property had been wrongfully used or taken, did no doubt create a quasi-contractual liability: and if the plaintiff chose to sue on a fictitious undertaking to give back the value of the property so dealt with, he could not also sue the wrongdoer in tort. But the waiver of the tort did not create the liability in assumpsit, and it is not a good way of describing a right to call attention to the remedy which you do *not* adopt.

The difficulty of accepting so dangerously vague a principle as that on which our author would base the liability in quasi-contract is well shown by some remarkable decisions of American Courts, which he condemns with no more severity than they deserve. Thus in *King* v. *Welcome*, 5 Gray 41 (p. 234), a contract to serve for a year from a future date was made orally. The plaintiff broke his contract within the year, and sued upon a *quantum meruit* for such services as he had rendered. He was allowed to recover, and the defendant was not allowed to prove that the contract was for a year's service lest he should thereby 'charge the plaintiff' with a contract which did not comply with the Statute of Frauds. It would seem that the Court overrode the expressed intentions of the parties and misinterpreted the Statute of Frauds in order to carry into effect some equitable notions of its own. Again, in *The Manhattan Life Ins. Co.* v. *Buck*, 93 U. S. 24 (p. 346), the parties agreed that on non-payment of a premium a policy of life insurance should be void, and that all previous payments should be forfeited. Yet upon default in payment of a premium it was held 'unjust and inequitable' that payments already made should be forfeited, and they were recovered. After this one cannot be surprised to find (pp. 254–257) that where work is agreed to be done upon a building which is destroyed by fire when the work is only commenced, the contractor is allowed to recover damages from his employer on the ground that the latter was bound 'to keep on hand and in readiness the building in which the work was to be done.'

If Courts of law are thus apt to disregard the plain meaning of parties to contracts, and to award sums of money in accordance with their own crude or fantastic notions of what is equitable, Mr. Keener will have done practical service to the litigant in his endeavour to define an obligation so liable to indefinite extension. In any case he has earned the thanks of the student for his effort to collect and arrange the rules which govern a difficult and somewhat neglected branch of our law. W. R. A.

Tagore Law Lectures, 1893. *The Law of Estoppel in British India.* In Two Parts. I. *Modern or Equitable Estoppel.* II. *Estoppel by Judgment.* By Arthur Caspersz. Calcutta: Thacker, Spink & Co. London: W. Thacker & Co. 1893. La. 8vo. xxxix and 511 pp.

The learned author mentions in his preface that his work contains the substance of sixteen Tagore lectures. He has devoted the first part of his work to modern or equitable Estoppel, that branch of the subject which at the present day is of the greater practical importance, and relegated the subject of *res judicata* to the second part. The law of Estoppel in India, as he points out, has in several particulars been laid down in general terms in chapters of the Indian Codified Law; *Res judicata* in the Civil Procedure Code, and Estoppel arising from representation, from tenancy, from acceptance of a bill of exchange, and from the position of a bailee or licensee, in

the chapter on Evidence. But the treatise of Mr. Caspersz ranges over the entire subject, including those portions of the law of Estoppel not yet dealt with in the codified chapters of the Indian law. A great body of decisions had grown up in India prior to the so-called Codes, and the stream of cases still flows on. The groundwork of the law of Estoppel in both of the branches into which Mr. Caspersz has divided it, is in the main the same in India as in England, but there are peculiar features in many of the Indian cases, especially in Estoppel arising out of representation, as, for instance, Benami transactions, which would be perplexing to one who had given his mind solely to those of the English type. It must therefore be an advantage to the Indian law student and practitioner to meet with a treatise presenting the most important English and Indian cases, set out with great fullness and accuracy, and discussed with care. We have looked carefully through the whole work, but from want of space are precluded from observing upon particular parts. It may be well however to refer to two points, and first to the subject of Estoppel by previous judgment. On this question very conflicting views have been entertained by the Courts in India as to the meaning of the term 'on the same cause of action' in section 2, Act VIII of 1859 (the first enactment of the Civil Procedure Code), and of the language employed in section 13 of the latest enactment of the Code, Act XIV of 1882. Explanation II of this section embodies the rule enunciated in *Henderson* v. *Henderson*, 3 Hare 115, that the plea of *res judicata* applies not only to what was actually brought before the Court and decided, but to every point which properly belonged to the subject of litigation and which the parties exercising reasonable diligence might have brought forward at the time. The gradual working out of these views and the endeavours made to reconcile them are well presented in Chapter V, Part II. Secondly, we may notice the part of Mr. Caspersz' work in which the construction of section 115 of the codified law of evidence, as embodying the law of Estoppel by representation, is dealt with. On this matter, all the important decisions are carefully marshalled and discussed, including the recent Privy Council judgment in *Sarat Chunder Dey* v. *Gopal Chunder Laha*, L. R. 19 I. A. 203, which finally decides that the law of India, as far as it is embodied in this section, is identical with that of England.

The arrangement of the subjects of the chapters in the two parts appears natural and convenient. Mr. Caspersz has followed the plan now largely adopted of attaching to each case the year of its decision, which enables the student to trace the gradual development of the law. The work appears to have been executed with great care and ability, and it is, we think, likely to commend itself to students and to the profession generally, both in England and in India.

Estoppel by matter of record in Civil Suits in India. By L. Broughton. London: Henry Frowde, and Stevens & Sons, Lim. 1893. 8vo. xi and 168 pp.

Mr. Broughton's little work bears marks of undue haste in preparation, which will probably detract from its usefulness as a repertory of the law in a small compass. Part III, Chapter viii, beginning at page 114, is intended to show principally how the Evidence Act regards the judgments of Courts of exclusive jurisdiction, but it is headed 'Estoppel by Judgment,' a subject which has already occupied the preceding 113 pages, and is indeed, properly considered, the subject of the entire work. The regular mode of citing the

Indian Reports is not always observed, so that it is sometimes difficult to distinguish between the earlier Reports of the several High Courts and the later Indian Law Reports. In so complicated a subject an index to the text is almost indispensable.

As a whole, we think the work is susceptible of much improvement.

The Elements of Jurisprudence. By T. E. HOLLAND. Sixth Edition. Oxford: at the Clarendon Press, and London: Stevens & Sons, Lim. 1893. 8vo. xx and 395 pp.

THE mere fact that this work has reached a sixth edition in a little more than thirteen years is sufficient to prove its established reputation, and there is no need for us to recommend it to our readers. We learn from the preface that it has undergone careful revision since the last edition was published in 1890, and that the author has now translated the German and Greek definitions which occur in the earlier chapters. In other respects there seems to be no substantial difference between this edition and its immediate predecessor. There are, however, two matters upon which we should like to offer a little criticism, particularly as they are of fundamental importance, and because the author's views upon them appear never to have been challenged, or at any rate never to have hitherto been shaken.

The first is the capacity of the State to have legal rights against its own subjects under laws of its own enactment (p. 116). 'The State is surely as capable of possessing rights as the Corporation of London' is an argument which apparently forgets the crucial difference between the two cases—that the Corporation is a subject, while the State is the State—and which we could hardly believe could be used by any one who had ever read the convincing reasoning of Austin. Surely one might as well speak of God having 'rights' against his own creatures, correlative to the duties imposed on them by the Divine Law! The second matter is the classification of Rights on pp. 110 sqq. Of the four ways in which Professor Holland has always said they may be classified, only the third and fourth are known to Austin. The other two—the division into Rights Public and Private, and that into Normal and Abnormal—appear to be untenable. Law, no doubt, may be divided into Public and Private, or into Normal and Abnormal; but it does not follow that Rights admit of being divided in the same ways; and even assuming that there can be such a thing as a 'Public Right,' it seems impossible to distinguish it, *as a right*, from an identical 'Private' right. Is not the State's so-called right to its cavalry horses precisely the same kind of right as my right to my horse? or if I have two exactly similar horses, and present one to the State, and the other to a friend, do they thereby become different kinds of horses? So too with the 'Abnormal' Rights. It would seem, on reflection, that there is nothing 'abnormal' about the Right, for we believe that under given circumstances every so-called abnormal right may belong to the normal man. Is the infant's right to avoid his contracts at his option a different kind of right from that of a normal man to rescind a contract into which he has been induced to enter by fraud or undue influence? What is abnormal is in truth the way in which the law treats certain classes of persons, as compared with the great majority.

J. B. M.

The first principles of Jurisprudence. By JOHN W. SALMOND. London: Stevens & Haynes. 1893. Cr. 8vo. xii and 264 pp.

THIS is a short introduction to Jurisprudence confined to the complex idea of Law. It is chiefly characterised by its apparent desire to reform or subvert the generally accepted theories, definitions, and classifications of modern jurisprudence. Its first chapter may be described as an attempt to reproduce the confusion of ideas as to law, sanction, rights and such notions, which Austin spent many years of his life to dissipate; to re-introduce theories of natural and positive rights; to justify by usage and reason speaking of rights, wrongs, and duties apart from any regulative system; to be conscious of no absurdity in saying that a man wrongs himself, and no man is wronged who has no rights—'why then has he no rights against himself?'—and much else which Austin would have relegated to the sphere of ethics.

The chapter on administration of Justice, and the distinction between Punishment and Redress, Criminal and Civil law is well and clearly reasoned out. Modern definitions of law are subjected to considerable criticism, as omitting, in three respects, essential parts of modern legal systems.

In the chapter on the state, the definitions of political society of Bentham and Austin are considered, and a new definition proposed and justified. The doctrine of the illimitable power of the sovereign in legislation is called in question under the new definition of law 'which embraces all the principles applied by the state in administering justice, and not merely those which create and define duties'; the author's conclusion being based more on hypotheses than on facts. The question of the state's having legal rights against subjects is decided in the affirmative by application of new definitions of right and wrong.

There is a very ingenious discussion on Property and Obligation, based however on a new definition of rights *in personam*, confining their scope to a right to a duty to act, and to a negative wrong. 'Thus a personal right is a right to receive, while a real right is a right to retain.' The idea that a right *in personam* may be to a forbearance, e. g. arising from a contract in restraint of trade, the author rejects, or omits.

There is also a new theory of the true distinction between substantive law and procedure, and an interesting and novel discussion on the origin of law. The book is an exceedingly suggestive one, though decidedly heterodox in its opinions.

A Treatise on the Law of Bills of Lading. By EUGENE LEGGETT. Second Edition. London: Stevens & Sons, Lim. Calcutta: Thacker, Spink & Co. 1893. 8vo. lxiv, cxiv and 671 pp.

THIS work, the special characteristic of which has been the considerable number of forms of bills of lading collected in its appendix, has now reached, after some delay, a second edition, and in doing so has assumed almost an excessive bulk. It surely ought to be possible to deal with the law of bills of lading, which after all is not a subject of great magnitude, in less than nearly 850 pages. It certainly at first sight is refreshing to find nearly fifty pages devoted to the Through Bill of Lading, for that curious and complicated product of commercial development bristles with difficulties, if it is sought to force it within the strict limits of legal propositions, and the temptation to the cautious writer of text-books to dismiss such a Frankenstein's monster rather summarily is great. But the appearance of

discussion in Mr. Leggett's book is delusive. One-third of the fifty pages are devoted to what is practically a verbatim reprint of Greeves' case, and the judgment of Kelly C.B. therein, while another eight pages cover an abstract of *Moore* v. *Harris*; when the statutes and cases cited at some length have been eliminated, the amount of discussion of principle left is remarkably small.

Indeed while Mr. Leggett's book is useful as a collection of cases, for students to whom reports are not accessible, the grasp of principle displayed in it is very slight. A work whose main divisions are:—'Part I. the Nature of a Bill of Lading, and its Legal Incidents. Part III. The legal effect of the several clauses and stipulations in the Bill of Lading. Part IV. The rights and liabilities of the several parties under the bill of lading,' obviously betrays a lack of the system and power of generalization necessary to the writer of a good law-book. A work which begins with a so-called definition of a bill of lading like the following:—'A bill of lading is a negotiable document transferable by endorsement, and is made singly or in sets .... and is signed by the master or the purser of the vessel, or by an agent or clerk of the owner or charterers, or by a broker per procuration,' still more clearly shows the same failing. The definition quoted would tell a student approaching the subject for the first time nothing that would distinguish a bill of lading from a bill of exchange, except that it had some undefined connexion with a ship, and the student would read through six pages of details before reaching the clear and comprehensive definition of the Indian Stamp Act. The book, in short, is a good example of the old system of making books by stringing cases and headnotes together by general remarks.

Mr. Leggett has done service in calling attention to the recent United States Act, which has declared the bills of lading in common use in England on ships trading with ports of the United States, null and void, and instead has endeavoured to make a contract for the parties. The key to the interpretation of this statute by the English Courts will be found in the Missouri case (1889) (42 Ch. D. 321), strengthened by a declaration inserted in the bill of lading of the intention of the parties that their contracts shall be governed by English law. The recent rules formulated by a London conference, too late for notice by Mr. Leggett, will call for practical attention when, if ever, it shall appear that any large shipowners intend to act on them.

Darby and Bosanquet's Practical Treatise on the Statutes of Limitations of England and Ireland. Second Edition. By F. A. Bosanquet, Q.C., and J. R. V. Marchant. London: W. Clowes & Sons, Lim. 1893. xcii and 796 pp.

A Treatise on the Statutes of Limitations. By Edgar Percy Hewitt. London: Sweet & Maxwell, Lim. 1893. xxvi and 335 pp.

Twenty-six years have elapsed since the appearance of Darby and Bosanquet's Treatise on the Statutes of Limitations. During this period that work has held the field, no other very satisfactory dissertation on the subject of it having been produced. The result of this delay in the preparation of a second edition has been to compel the practitioner to consult special handbooks in all cases in which the law since 1867 has been altered by statute or by decision. And in the interval since that date at least two important Acts of Parliament—the Real Property Limitation Act of 1874, and the Trustee Act, 1888—and a mass of judicial opinion, have combined to alter,

modify or settle many points relating to the limitation of actions. In the meantime, Mr. Darby has died, and Mr. Marchant has become the colleague of Mr. Bosanquet. The legal profession is to be congratulated upon the possession of a work, which, after a careful examination of its statements and comments upon difficult questions, appears to us to supply a long-felt want —the want of a reliable guide to a very intricate and far-reaching branch of English jurisprudence. The plan of the new edition follows substantially that of its predecessor, but we are not surprised that, having regard to the causes already mentioned, it has become necessary, as the authors state, to rewrite the entire book. Dr. Hewitt's work is altogether upon a smaller scale than Messrs. Bosanquet and Marchant's. It does not pretend to collate, compare, or distinguish decided cases to anything like the same extent as is done in the larger treatise, nor does it apparently aim at more than a clear exposition of the true meaning and application of the several statutes themselves as shown by the authorities bearing upon them. This is useful work, and as it has been done in a conscientious manner, Dr. Hewitt's labours will enable the student as well as the practical lawyer to find in a concise form the solution of most of the problems presented by the statutes in question. Probably few other subjects require so much consideration of legal principle as those arising in connexion with the statutory time-bar. The true nature of the right, contract or debt sued upon, the moment when the claim begins to be barred by time, the sufficiency of an acknowledgment relied on to stop the statutory time from running, the interpretation of the somewhat crabbed language in which some of the enactments themselves are couched, have in their turn, and amongst many other abstruse points of law, given rise to much, and, in several cases, conflicting, decision. It is now, perhaps, time that an effort should be made, if not to codify, at least to digest, in a single statute the crowd of enactments having a limitation of suits as their object. It is certainly time that the inconsistency of the 40th section of 3 & 4 W. IV. c. 27 with the 3rd section of 3 & 4 W. IV. c. 42 should be got rid of. And it is disappointing to find that the Legislature should not in the Trustee Act, 1893, which, while pretending to be a mere consolidation Act, contains at least some amendments of statutes incorporated in it, have given some assistance in the interpretation of the 8th section of the Trustee Act, 1888, with reference to the limitation of actions against trustees.

Manual of Practice in the Court of Session. By Æ. J. G. MACKAY. Edinburgh: William Green & Sons. 1893. 8vo. xv and 801 pp.

MR. MACKAY'S Practice of the Court of Session is a standard work. It is well known even to English readers. It has the rare distinction of being one of the few books about practice which a lawyer at any rate can read with pleasure. The extensive view however which Mr. Mackay took of his subject, though it made his book a mine of curious information, may possibly have increased its bulk beyond the size which suits the convenience of practitioners. The aim of the new Manuel of Practice is to provide a guide to the procedure of the Court of Session for the use of lawyers engaged in actual business. We cannot doubt it will answer its purpose. Mr. Mackay's reputation is an absolute guarantee for the accuracy of everything he writes. He is a master of his particular subject, and even an English lawyer, who cannot write as an expert about Scotch law, may admire the skill with which our author has compressed the results of his large and

valued treatise into the Manual. It is scarcely necessary to add that the statements in the book are brought well up to date. An English critic naturally turns to some of those points as to the jurisdiction of Scotch Courts which interest Englishmen. At pp. 58–61 he finds a succinct but perfectly intelligible account of jurisdiction founded on arrestment, whilst at p. 479 he finds a singularly terse and accurate statement of the Court of Session's jurisdiction in matters of divorce. It is satisfactory here to observe that the law of England and the law of Scotland have on this topic at last been brought into reasonable agreement. In both countries it is now settled that domicil is the basis or condition of jurisdiction. The Court of Session, on the one hand, if we understand Mr. Mackay rightly, no longer asserts the right to divorce persons who are not in fact domiciled in Scotland; the claim to base jurisdiction on a constructive domicil of forty days' residence has been given up. The English Courts, on the other hand, have, it may be confidently assumed, though *Harvey* v. *Farnie*, 8 App. Cas. 43, is not absolutely decisive, abandoned the logically unfounded notion that an English marriage could not be dissolved by any foreign Court. This is a subject on which it would be easy to write pages. The point however to which we wish at this moment to call the reader's attention is that all the information which can be needed by any one as to the connexion under Scotch law between divorce jurisdiction and domicil is compressed into little more than one page of Mr. Mackay's admirable Manual.

Commentaries on the Law of Public Corporations. By CHARLES FISK BEACH, Jr. Two Vols. Indianapolis: Bowen-Merrill Company. 1893. La. 8vo. cclxiii, xxiv and 1692 pp.

THE law of corporations, public and private, has a peculiar importance in the United States, more especially through its intimate connexion with many great constitutional questions. Few branches of the law have had a fuller development there, or undergone a more thorough discussion. The American text-books on private corporations are many, and unusually satisfactory; and public or municipal corporations have been the subject of a careful and able treatise by Judge John F. Dillon. Mr. Beach has thus entered a field already well occupied. It is to be regretted that he has not done more to justify the step. These two large volumes, which, by the way, give ample evidence of the author's debt to his predecessors, contain a copious citation of authorities that may well make them a convenient handbook for the use of the practising lawyer. But of the careful thought and close reasoning which the difficulties of the subject particularly demand, there is hardly a trace. Doubtful and intricate matters in the law of municipal corporations, many of them deeply complicated by conflicting decisions and perplexed discussion, are passed over with an ease which, so far from removing the difficulties, scarcely suggests them. Of many conspicuous instances it will be enough to mention the power of municipalities to issue negotiable obligations; their liability upon such obligations by estoppel based on recitals therein; important constitutional questions as to the so-called 'police power' of the legislature, and the right of eminent domain; and the thrice confused topic of a town's liability for the torts of its officers and agents. He who seeks for light on any of these vexed questions will obtain little from Mr. Beach beyond a reference to the principal cases which discuss them. As a whole the book differs little from the great mob of law-books which, with many sins of omission, find such justification as they have in furnishing the profession with a kind of specialized digest of the authorities.

Company Law: an abridgment of the law contained in the Statutes and Decisions. By MONTAGUE MUIR MACKENZIE, EDWARD ARUNDEL GEARE, and GAWAYNE BALDWIN HAMILTON. London: Stevens & Sons, Lim. 1893. La. 8vo. lxiv and 443 pp.

IT is not very long since we reviewed in these pages Mr. Manson's Dictionary of Company Law. Now we have a new index of Company Law, which has itself an exhaustive index. The book in our hands is an alphabetical index, with a second alphabetical index superadded. It is divided, neatly and logically enough, into three heads, first, 'the Formation of Companies,' secondly, 'the Company as a Going Concern,' and thirdly, 'Winding-up and Reconstruction.' For the first of these heads Mr. Geare is responsible, for the second and third, with the index and table of cases, Mr. Hamilton. What then is left for Mr. Muir Mackenzie? Surely the supervision and editorship of the book as a whole. No, for the preface says that 'the labour which has been bestowed upon the work is entirely that of Mr. Geare and Mr. Hamilton,' and that any 'credit is due to them alone.' Upon this Mr. Muir Mackenzie would seem to be no more than an 'ornamental leader.' However this may be, the book which bears his name is likely to be useful in Company practice. It succeeds in its aim of bringing together the statutory enactments and the decisions of the Courts in a form easy of reference. We are a little surprised to find that there is only a single finger-post directing the wayfarer to the Directors' Liability Act of 1890. But as a collection of the case law and statute law as focussed upon each of the myriad points within the ambit of Company law, this book bids fair to be useful to the officials of companies and a serviceable weapon in the hands of practitioners. It deserves a fair measure of success.

A Guide to the Income-Tax Acts for the use of the English Income-Tax Payer. By ARTHUR M. ELLIS. Third Edition. London: Stevens & Sons, Lim. 1893. xix and 359 pp.

MR. ELLIS'S useful Guide to the Income-Tax Acts has, we observe, reached a third edition. We do not wonder at this. The book constitutes a convenient manual for the guidance of persons unfortunate enough to be involved in the meshes of our income-tax legislation. The work is a good one of its kind. We may nevertheless doubt whether the kind of book, of which Mr. Ellis's work is a good specimen, can without the aid of a lawyer be of much practical advantage to laymen. What ordinary man or woman, for example, without legal training can really understand the effect of *Colquhoun* v. *Brooks*, 14 App. Cas. 493, the account of which fills eight of Mr. Ellis's pages? The manual is probably meant for and used by solicitors and their clerks. To them it is, we doubt not, of real use; and, after all, if manuals giving an account of the Income-Tax Acts are of not much use to the mass of laymen, it is not the writers thereof who are to blame. They deal with an intractable material. Nothing but re-drafting and re-enactment can make the law as to income-tax, and the same thing holds good of all our financial enactments, really intelligible. There is in the nature of things nothing, but there is in the nature of modern parliamentary government a great deal, to make the production of a clear financial code, which should tell every intelligent man what are his obligations as a taxpayer, an impossibility. The nation and individuals would gain much by a codification of the Income-Tax Acts. But it is highly improbable that as things now stand the Income-Tax Acts will ever be codified. Meanwhile bewildered taxpayers must help

themselves out of their difficulties by the aid either of legal advisers or of manuals, and among legal manuals Mr. Ellis's Income-Tax Acts will be found to occupy a high place.

The Law relating to Covenants in Restraint of Trade. By JOSEPH BRIDGES MATTHEWS. London: Sweet & Maxwell, Lim. 1893. 8vo. 246 pp.

IT reflects no small credit on a busy solicitor to have found time for the careful and exhaustive study of the law of covenants in restraint of trade. It is significant by the way of the tropical growth of our case and statute law that a single topic like this of covenants in restraint of trade or 'Service out of the Jurisdiction,' or 'Conditions of Sale,' is enough to furnish forth a volume. In treating his subject, Mr. Matthews has rightly recognized that to make it intelligible he must trace the history of these covenants. They illustrate in a remarkable way the self-adjusting power of the common law to meet new conditions. Necessarily they have changed much, but the principle which has moulded them from the reign of Henry V, and before it, until to-day has been the same, an industrial public policy, judicially expounded, setting strongly against monopolies and checking the illegitimate impulses of private self-interest; and this industrial policy is still the test of the reasonableness of the restraint, not merely the protection of the covenantee. It is the flaw in Fry L.J.'s judgment in *Rousillon* v. *Rousillon* (14 Ch. D. 351) that it rests the modern doctrine too much on this protection of the covenantee. The only fault we can find with Mr. Matthews is that he has perhaps been over-scrupulous in setting out side by side what he calls the 'jarring opinions' of individual judges, as 'Lord Justice Bowen's Theory,' 'Lord Justice Cotton's Theory,' and so on. This method is apt to confuse, to blur the broad outlines of the subject.

One excellent feature of the book is the digest of cases at the end, arranged in chronological order.

Technology of Law. By WM. T. HUGHES, of the Colorado Bar. London: Stevens & Sons, Lim. 1893. lxxi and 364 pp.

MR. HUGHES is quite right in speaking of his book 'as a great innovation on the established forms of book-making.' Indeed what with the novelty and a certain nebulousness in the author's style, we had a difficulty at first in understanding at what, in homely phrase, the author was driving. In due time, however, patience was rewarded, and we discovered that 'Technology of Law' meant nothing more formidable than a key—a skeleton key—to cases and text-books. The author's 'technological table,' 'tips or technics' is in fact a list of the names of leading cases and legal maxims ('beacon lights,' Mr. Hughes magniloquently terms them 'shining on from age to age'), with the principal sub-headings of the subject to which they relate, and the names of relevant cases grouped under them. For the weak brother, who cannot turn at once to his appropriate maxim or leading case (and we fear the weak brethren are many), there is a subject-index referring to the technological table. The idea of the book has certainly merit—the merit of enabling a lawyer to get quickly on to the scent of the authorities he wants, and a generation groaning under the *immensus aliarum super alias acervatarum legum cumulus* may be grateful for such assistance. But we think Mr. Hughes would better his method if he made the subject-index the main one, made it in fact a skeleton digest.

The Judicial Practice of the Colony of the Cape of Good Hope and of South Africa generally, with practical forms. By C. H. VAN ZYL. Capetown: J. C. Juta & Co. 1893. 8vo. xvi and 674 pp.

THIS is an admirable book, and supplies a want long felt by lawyers and students in South Africa. Owing mainly to a long series of well-considered decisions in the Cape Supreme Court, which have been adopted and followed by other South African Courts, a well-defined system of practice and procedure has been established. Yet no serious attempt has hitherto been made to provide a text-book on this important subject, and, as Mr. Van Zyl shows, many useful decisions have never to this day been reported. It would be of great advantage if he would publish the notes which he possesses of these unreported practice cases.

The title of Mr. Van Zyl's book is cumbrous and might well be abbreviated, while the general index might be improved and an index of cases added. As to the main contents less space should have been given to some of the minor subjects; we refer, for instance, to the chapter on 'espousals.' On the other hand, such important features of the Roman Dutch system as the tenure and transfer of immovable property with its incidents, and the law of wills and *fidei commissa*, might have been dealt with at some length. And, though it would widen the scope of Mr. Van Zyl's book, it would be well worth while in a new edition to add a chapter on the special legislation on gold and diamond mining in South Africa. But these friendly suggestions are not meant at all to detract from the hearty praise which we have already gladly accorded to the book in its present form, and which is well worthy of the high reputation borne by its author among lawyers at the Cape.

Forms of Judgments and Orders in the High Court of Justice and Court of Appeal. By the late Hon. Sir H. W. SETON. Fifth Edition by CECIL C. M. DALE and W. CLOWES. Vol. III. London: Stevens & Sons, Lim. 1893. La. 8vo. ccxii and 1773–2607 pp.

WE welcome the prompt appearance of the third and final volume of 'Seton.' It contains the 'apparatus,' the table of cases and the index for the whole work, and is therefore invaluable to the practitioner in Lincoln's Inn. It is true that each of the two previous volumes had its own index. But what the Equity draftsman wants to aid him in his difficult task of settling minutes is the index to the whole work. For want of this we have ourselves known a Chancery counsel foiled in Court. This last instalment of a familiar helpmate is compiled with all the laborious care and patient industry which its predecessors have taught us to claim at the hands of Mr. Cecil Dale and Mr. Registrar Clowes. Our only quarrel is with the magnitude of the 'Addenda,' which is preternaturally great.

We have also received:—

A Manual of the Law specially affecting Catholics. By WILLIAM SAMUEL LILLY and JOHN E. E. WALLIS. London: William Clowes & Sons, Lim. 1893. 8vo. xvi and 266 pp.—The object of this book is to provide for the use of Catholics a manual of the law specially affecting their religion and their religious interests. The authors appear to have accomplished their task in a satisfactory manner. The chapter in the book most interesting to the general reader is that which discusses existing disabilities, which the authors hope will 'throw some light on the alleged disqualification of Catholics to fill the offices of Lord Chancellor of England and Lord Lieu-

tenant of Ireland.' It appears that in 1872 the late Sir Colman O'Loghlen put a question on the subject in the House of Commons to the then Attorney-General, now Lord Coleridge C.J. The answer given by the Attorney-General, which bears marks of careful consideration, is given at length in Appendix C: it shows that in his opinion, given perhaps with some hesitation, that Catholics can fill both these offices. The reader will find the question discussed at p. 36 et seq. He will perhaps be surprised to learn how many and what serious disabilities were imposed on 'Jesuits and members of other religious orders or societies of the Church of Rome resident within the United Kingdom' by the Emancipation Act of 1829. No steps to give effect to these provisions of the Act have ever been taken, and as the penalties imposed by the Act can only be enforced at the instance of the Attorney-General in England or Ireland and of the Advocate-General in Scotland, it is highly improbable that any attempt will ever be made to enforce them.

Supplement to the Fourth Edition by Leopold George Robbins of Bythewood and Jarman's Conveyancing. By the Editor and ARTHUR TURNOUR MURRAY. London: Sweet & Maxwell, Lim. 1893. La. 8vo. xxxvi and 454 pp.—'The main object of this Supplement is to bring the Fourth Edition of Bythewood and Jarman's Conveyancing up to date.' Thus say the editors in the preface. We consider that they have most carefully performed the task that they set before themselves. The changes in Statute Law made since the publication of the Fourth Edition in 1884 are considerable. The reader will find full discussions of the Land Charges Registration and Searching Act 1888 (at p. 10), of the Arbitration Act 1889 (at p. 57), of the Deeds of Arrangement Act 1887 (at p. 79), of the Mortmain Act 1892 (at p. 216), of the Partnership Act 1890 (at p. 232), of the Lands Registry (Middlesex) Deeds Act 1891 (at p. 300), and of the 'Estate Duty' clauses of the Customs and Inland Revenue Act 1889 (at p. 383). On looking at these discussions the Conveyancer will find exactly what he wants. The editors have very carefully referred all the material decisions reported up to July 1893. On the whole we may say of this book that it is quite up to the standard to which Mr. Robbins always attains: what higher praise can we give?

Parliamentary, County Council and Municipal Elections. By PATRICK JAMES BLAIR. Edinburgh: William Green & Sons. 1893. 8vo. xv and 495 pp.—This is a useful practical treatise, and cannot fail to be of service both to aspirants for office and to the officials responsible for the due conduct of elections. Although primarily intended for Scotch readers, there is much in it which is of more general interest. Not the least valuable part is the appendix, which contains a complete summary of the duties of the officials, upon and in anticipation of the various elections, together with the forms proper to be employed at each step. The author gives some facsimile illustrations of the way in which electors should *not* vote, together with information as to what amount of eccentricity in the marking of a ballot paper is allowable. Truly the capacity for error is infinite, and looking at these facsimiles one might think that the intelligent elector had been trying to play at the child's game, and had endeavoured to place the mark at the right spot with his eyes closed. There are useful tables for the enumeration of votes. It may surprise some readers to learn that where there are two vacancies and five candidates—a by no means unusual case—in municipal contests, each voter may vote in any one of thirteen different ways.

The Law of Insurance; including Fire, Life, Accident, Guarantee, and other Non-Marine Risks. By ARTHUR BIDDLE. Two vols. Philadelphia: Kay & Brother. 1893. La. 8vo. civ, 649 and 764 pp.—This is a valuable treatise on a subject of almost universal interest. There are few indeed who do not, in some form or other, avail themselves of the modern facilities of insurance. Quite a new kind of insurance has recently developed itself in England in connexion with the guaranteeing of mortgages, and of deposits at banks and the like; and owing to the depression in real estate, and to failures in Colonial banks, many cases on such policies are likely to come before the Courts.

In an English case not yet fully reported (*Dane* v. *Mortgage Insurance Company*, W. N. 1893, p. 177) the decision seems to have turned on the difference in law between the contract of suretyship and that of insurance. On referring to the work before us we cannot find that this question is fully dealt with. But to the thorny paths of insurance—other than Marine—this work appears on the whole to be a reliable guide. It contains several thousand references to English and to American reports, and the work will no doubt be found useful to practitioners on both sides of the Atlantic.

Students' Precedents in Conveyancing. By JAMES W. CLARK. London: Sweet & Maxwell, Lim. 1893. vi and 144 pp.—This collection of elementary forms has been made with the view of being useful to teachers of law and their pupils, as an aid to study, not for use in practice. Under these circumstances can it be right in such a book to make the transferor of a mortgage debt convey the debt 'as mortgagee' (pp. 59, 61 and 69), or to state as if there was no doubt on the point (p. 81) that in a settlement on marriage full covenants for title may be implied by conveying 'as beneficial owner,' or to make the advancement clause in a settlement apply to shares taken by appointment (p. 95); or in a conveyance on sale by mortgagee and mortgagor to omit the words by which the mortgagor directs as beneficial owner, besides conveying as beneficial owner (p. 9)?

The Student's Guide to Real and Personal Property. By JOHN INDERMAUR and C. THWAITES. Third Edition. London: G. Barber. 1893. 8vo. 192 pp. —This is the third edition of a book which is well known and needs no introduction to students who are preparing for the final examination for the Bar. The system is well constructed for acquiring quickly an elementary knowledge of many of the principles of real and personal property law, and the questions and answers appear to be well chosen and arranged. It is hardly necessary to add that the book does not pretend to be, and is not, more than a guide or stepping-stone to more extensive reading, and is chiefly useful for examination purposes.

Legal Studies in the University of Oxford, a Valedictory Lecture delivered before the University, June 10, 1893, by JAMES BRYCE. London: Macmillan & Co. 1893. 8vo. 35 pp.—This eloquent and instructive address, with which the Chancellor of the Duchy of Lancaster quitted the Regius Chair of Civil Law, after occupying it for twenty-three years, is worthy alike of the author and of the occasion. It will repay the perusal of all who are interested in that renascence of Roman law in this country which the ex-professor has done so much to promote.

Rules and Usages of the Stock Exchange. By G. HERBERT STUTFIELD and H. S. CAUTLEY. Second Edition. London: Effingham Wilson & Co. 8vo. xviii and 181 pp.—This useful little hand-book has reached a

second edition. It gives the most recent decisions on the rules of the Stock Exchange, and will doubtless be found valuable both to members and to the public.

The Revised Reports. Edited by Sir F. POLLOCK, assisted by R. CAMPBELL and O. A. SAUNDERS. Vol. XI. 1809-1811 (17 & 18 Vesey—11 East—12 East—2 Taunton—2 Campbell). London: Sweet & Maxwell, Lim. Boston: Little, Brown & Co. 1893. La. 8vo. xvi and 847 pp.

The Revised Reports. Vol. XII. 1811-1813 (1 & 2 Ball & Beatty—19 Ves.—1 Ves. & Beames—13 & 14 East—3 Taunt.—Wightwick—2 Camp.). London: 1893. La. 8vo. xv and 791 pp.

A Treatise on the Law of Executors and Administrators. By the Right Hon. Sir E. V. WILLIAMS. Ninth Edition. By the Hon. Sir ROLAND L. VAUGHAN WILLIAMS. Two vols. London: Stevens & Sons, Lim. Sweet & Maxwell, Lim. 1893. La. 8vo. cxvi, viii and 2131 pp.—Review will follow.

A Treatise on the Law of Partnership. By the Right Hon. Sir NATHANIEL LINDLEY. Sixth Edition. By W. B. LINDLEY. With an Appendix on the Law of Scotland by J. CAMPBELL LORIMER. London: Sweet & Maxwell, Lim. 1893. La. 8vo. lxii and 939 pp.—Review will follow.

The Principles of the Law of Evidence. By W. M. BEST. Eighth Edition. By J. M. LELY. With Notes to American and Canadian Cases by C. F. CHAMBERLAYNE. London: Sweet & Maxwell, Lim. Boston: The Boston Book Co. 1893. La. 8vo. lx and 703 pp.—Review will follow.

Commercial Law. By J. E. C. MUNRO. London: Macmillan & Co. 1893. Sm. 8vo. 191 pp.—Review will follow.

A Handbook of Husband and Wife according to the Law of Scotland. By F. P. WALTON. Edinburgh: W. Green & Sons. 1893. 8vo. lxxi and 510 pp.

A Handbook of Prescription according to the Law of Scotland. By J. H. MILLAR. Edinburgh: W. Green & Sons. 1893. 8vo. xxxvi and 232 pp.

The Editor cannot undertake the return or safe custody of MSS. sent to him without previous communication.

THE

LAW QUARTERLY REVIEW.

No. XXXVIII. April, 1894.

AS I have strongly recommended Mr. Clark's useful little book of precedents, I may perhaps be allowed to answer some criticisms that have been made upon it and which may perhaps puzzle students. It is the received practice of conveyancers to make the transferror of a mortgaged debt convey 'as mortgagee': Wols. Prec. 280, 1 Prid. 623, 1 K. & E. 218. In a conveyance on sale by mortgagor and mortgagee where the mortgagor conveys as 'beneficial owner' it is not the practice and it would be useless to insert any words of direction by him 'as beneficial owner.' I have never heard it doubted that in a marriage settlement full covenants for title may be implied by the words 'beneficial owner' Wols. & B. 35, Elph. Introd. Conv. 276. The question whether the advancement clause in a settlement should extend to shares taken by appointment is rather vext (see this question discussed 38 Solicitors' Journal, 248); while in 2 K. & E. 461 following 3 Dav. Prec. 159 it is stated that the more correct practice is not to extend it to appointed shares, it is so extended either expressly or by necessary implication in Wols. Prec. 76, 2 Prid. 294, 317.

HOWARD W. ELPHINSTONE.

Mr. George H. Smith of San Francisco, whose Critical History of Modern English Jurisprudence (San Francisco, 1893, 83 pp.) lies before us, appears to think that all English lawyers implicitly accept the whole of Austin's philosophy—if it is a philosophy—of law. We have already hinted on more than one occasion that this is not exactly so, and we beg to repeat that when some of us express opinions inconsistent with Austin's (which Mr. Smith has duly noted) we are quite aware of the inconsistency, and mean thereby to signify that we do not agree with Austin (which natural inference Mr. Smith, we know not why, seems unwilling to draw). Further we do not think it necessary to be constantly contradicting Austin's fallacies in set terms, partly because we do not wish

needlessly to hurt the feelings of any one who still believes in them, but chiefly because we regard Austin's particular form of *Naturrecht* (for *Naturrecht* it is, as Dr. Brunner has pointed out) as already dead and buried for all students who have any sense of history. We welcome Mr. Salmond's fresh and ingenious 'First Principles of Jurisprudence' as a healthy sign of independent life among the younger generation. F. P.

THE SALE OF GOODS ACT, 1893 (56 & 57 Vict. c. 71).—Considering that this is merely a codifying Act, which has been carefully drafted to avoid the introduction of contentious matter, it has been a most unconscionable time in passing. However it is now on the statute book and forms an important step in the codification of contract law. It follows the lines of the Bills of Exchange Act, and is in general clear and concise, including in its scope almost the whole of the rules of law relating to its subject. It was not to be expected that in the present state of Parliamentary business any serious attempt could be made to materially alter the Statute of Frauds, but in its re-enactment several necessary verbal alterations have been made, and the following clause has been added:—'There is an *acceptance* of goods within the meaning of this section when the buyer does any act in relation to the goods which recognizes a pre-existing contract of sale whether there be an acceptance in performance of the contract or not.' This disposes of a class of cases of which *Taylor* v. *Smith* ('93, 2 Q. B. 65) was the last reported example. Another controversy which has been set at rest is that aroused by the decision in *Bentley* v. *Vilmont* (12 App. Ca. 471), which Lord Watson declared in his judgment to be an iniquitous result of the Larceny Act. Now, notwithstanding that statute, the property in goods obtained fraudulently from the owner by means not amounting to larceny, does not revest in the original owner 'notwithstanding any intermediate dealing with them, whether by sale in market overt or otherwise' 'by reason only of the conviction of the offender.' An innocent purchaser, without notice, who pays cash against the goods, is so far protected.

The Act does not affect the sale of horses: although an attempt was made to draw up a code of rules to supersede the old Acts of Philip and Mary, and of Elizabeth, it came to nothing: a similar fate befell a section abolishing the privilege attaching to sales in market overt, which remains unaltered, but what is exactly market overt is still unsettled, although *Hargreave* v. *Spink* ('92, 1 Q. B. 25) seemed to render some definition necessary. Notwithstanding apparent obstacles, it was found possible to extend the

operation of the Act to Scotland by means of saving clauses and some special provisions, so that we now have the law applicable to all three countries within the four corners of a single statute. The following are unaffected :—bankruptcy, the rules of the common law, including the law merchant (save in so far as they are inconsistent with the express provisions of this Act), and in particular the rules relating to the law of principal and agent, the effect of fraud, misrepresentation, duress, or coercion, mistake or other invalidating cause, bills of sale, mortgages, pledges, charges, &c., and in Scotland the landlord's right of hypothec or sequestration for rent.

Besides the Statute of Frauds (ss. 16 and 17) and Lord Tenterden's Act (s. 7), the following are repealed :—The Brokers Act, the Mercantile Law Amendment (Scotland) Act, 1856, ss. 1–5 (inclusive), and the Mercantile Law Amendment Act, 1856, ss. 1 and 2.

Mr. Gilbert ought to search the law reports for motives for comic operas. The 'Sultan of Johore' or 'The Baker and the Sultan' would, to begin with, be a capital title for a musical performance at the Savoy Theatre. The Sultan's feats in the Law Courts would lend themselves admirably to the treatment in which Mr. Gilbert's genius excels. We have first the worthy and unpretending Albert Baker who sues for the hand of Miss Mighell, obtains her love, and promises her marriage. Then Mr. Baker is the gay deceiver who is pursued by the injured fair into the Law Courts. Her triumph seems certain, when suddenly Albert Baker is transformed into the sovereign prince, the Sultan of Johore, and asserts his immunity from the laws of England. The lady produces the Queen's writ; the Sultan brings out of his pocket a certificate of sovereignty from the Foreign Office. A Court, amid the universal approval of international lawyers, pronounces that it has no jurisdiction over a sovereign. The Sultan is triumphant; the lady loses her case, and, we presume, pays costs. Surely Mr. Gilbert's genius can make something out of these suggestive incidents.

Mighell v. *The Sultan of Johore*, '94, 1 Q. B. (C. A.) 149, though it has its comic side, is a decision of some importance. It brings a whole line of cases to their logical conclusion. It establishes in the most distinct terms the broad principle that the Courts of this country have no jurisdiction over an independent foreign sovereign unless he submits to the jurisdiction, and that such submission cannot take place until the jurisdiction is invoked. Doubts which might be raised by *Munden* v. *Duke of Brunswick*, 10 Q. B. 656;

Duke of Brunswick v. *King of Hanover*, 6 Beav. 1; 2 H. L. C. 1; and *Wadsworth* v. *Queen of Spain*, 20 L. J. (N. S.) Q. B. 448, or rather by expressions used in the course of these cases, are now set at rest. The Courts have no jurisdiction over a sovereign independent prince either in his public or in his private capacity. *Mighell* v. *Sultan of Johore* in fact simply applies to different circumstances the principle involved, *The Parlement Belge*, 5 P. D. 197.

A curious question of international law still remains open for decision, and is not touched by *Mighell* v. *The Sultan of Johore*, nor by *The Parlement Belge*. What, if any, are the immunities, whilst in England, of an ambassador accredited by a friendly sovereign power, not to the Crown, but to some foreign sovereign? The very general language used by Brett L.J. in *The Parlement Belge*, 5 P. D. 197, 213, and approved by him as Lord Esher in *Mighell* v. *The Sultan of Johore*, suggests that such an ambassador is free from the jurisdiction of our Courts. The suggestion, which probably was not intended, is, it is submitted, erroneous. An ambassador accredited, e. g. by the Tsar to the King of Italy, stands when in England in the same position as any other Russian.

The sole point actually determined by *The Industrie*, '94, P. (C. A.) 58, is that a charterparty for the carriage of goods on board a German ship from one foreign port to another need not necessarily be presumed to be a German contract, and made subject to the law of the flag. Such a contract when made in an English form in England may be an English contract governed by English law.

The decision is of importance as exhibiting in a very strong light two tendencies of English judges when construing a contract as to which one may doubt whether it is or is not made subject to foreign law. The one tendency is to hold that the only principle applicable to the case is that the contract must be construed in accordance with the law to which the parties presumably intended to subject themselves (*Lloyd* v. *Guibert*, L. R. 1 Q. B. 115). The other tendency is to assume, in applying this principle that if the contract was made in, or had any relation to England, the parties intended to subject themselves to English law. The existence of this second tendency or bias on the part of English judges will no doubt be disputed, but to anyone who has carefully examined the line of cases to which *Lloyd* v. *Guibert*, *The August*, '91, P. 328, and *The Industrie* belong, the prevalence of a leaning, possibly not an unreasonable leaning, towards the assumption that English law is the proper law of any contract connected with England, must appear a marked characteristic of English Courts.

South Hetton &c. Co. v. *The North Eastern News Association*, '94, 1 Q. B. (C. A.) 133, determines that an action of libel will lie at the suit of a corporation in respect of a libel calculated to injure its reputation in the way of its business, without proof of special damage. This decision will cause surprise to lawyers. It is quite in conformity with the *Metropolitan Saloon Omnibus Co.* v. *Hawkins*, 4 H. & N. 87, but is noteworthy as carrying out the principle to which the Courts clearly now adhere, that the right of a corporation to sue for a wrong is in general the same as the right of a natural person. The limits to be placed on the application of this rule arise simply from the fact that there are certain things which cannot conceivably be done by a corporation as such. Hence a corporation cannot sue in respect of the imputation of murder or adultery. As a corporation cannot commit these offences, to charge a corporation with them is simply to utter senseless abuse.

To many readers *Bowes & Partners* v. *Press*, '94, 1 Q. B. (C. A.) 202, will prove the most interesting case in the Law Reports for this quarter. It deals with the rights of employers and employed in the case of a strike, and proves that under the Employers and Workmen Act, 1875, 38 & 39 Vict. c. 90, workmen belonging to a union, who in breach of contract refuse to work with a non-unionist, may be substantially fined. The decision, we venture to say, will commend itself to everyone's good sense. The proper correlative of any man's freedom to enter into a contract is liability to pay damages for the breach of it, and the very considerations which make it economically and politically desirable that workmen should be able both individually and collectively to make any promises they choose, also make it imperative that the breach of such promises should subject them to pecuniary loss. *Pactum serva* is an elementary maxim, but it is a sound and a just one, and like all just rules applies to every class of the community.

In *Synge* v. *Synge*, '94, 1 Q. B. 467, the Court of Appeal has extended the sound and useful rule in *Hochster* v. *De la Tour*, 2 E. & B. 678, 22 L. J. Q. B. 455, that disabling oneself from the future performance of a contract may be treated as an immediate breach, to the case of a man alienating *inter vivos* what he has promised to leave by will. The contract being here in consideration of marriage, the Court intimated that, if asked, it would have decreed specific relief against all persons claiming through the promisor as volunteers. As to the existence of a binding though informal contract the case is a simple application of *Hammersley* v. *De Biel*, 12 Cl. & F. 45.

Readers accustomed to the ways of the Law Reports will see with only moderate surprise that Kay L.J. is represented as sitting alone in the Court of Appeal and as giving judgment on a certain day in January 1874.

Lord Justice Bowen's judgment in *American Must Co.* v. *Hendry* (5 R. 331) carried us back to 'wild times.' We are nearing the twentieth century now, but we still have—such is the continuity of English law—bailiffs scaling walls and assaying windows to effect their raid on the Englishman's castle. In *Long* v. *Clarke* (69 L. T. R. 654) the bailiff had got over the wall of the tenant's back garden by means of a ladder and so through a half-open window at the back of the house. The legality of this was impugned on the strength of *Scott* v. *Buckley* (16 L. T. R. 573), but the Court of Appeal had no difficulty in adopting *Eldridge* v. *Stacey* (15 C. B. N. S. 458) in preference: as Kay J. justly remarked, if you may get in through an upper window by a ladder why not over the wall of the curtilage? In *Lewis* v. *Owen* a few pages further on (69 L. T. R. 861) we have the primitive scene of private war re-enacted—the tenant assaulting the bailiff while getting over a hedge. The County Court has now jurisdiction to fine for this (County Courts Act, 1888, c. 43), and it is satisfactory to know that the jurisdiction is punitive and non-appealable: for this kind of self-help is to be discouraged.

Section 25 of the Companies Act, 1867, is an edge tool, dangerous to play with (*Re Eddystone Marine Insurance Co.* '93, 3 Ch. 9) (C.A.). It does not enable you to allot shares for nothing merely by registering a contract, however honest your intentions may be. 'Meaning,' as Mr. Macey, the parish clerk in Silas Marner, said, 'doesn't go far in these matters. You may mean to stick things together and your glue may be bad, and then where are you?' Where the allottees of these shares were was on the list of contributories. *Browning's case* (10 Times L. R. 274) is the sequel of this transaction. Some of the shares given away under the registered contract had got into the hands of a bona fide holder for value, but unluckily for him the certificates had on the face of them 'Bonus Shares,' and the Court held this enough to fix him with notice that they were unpaid. No satisfactory device for getting round sec. 25 has yet been invented.

Re Low, Bland v. *Low* ('94, 1 Ch. (C. A.) 147) is a very interesting illustration of legal juggling. Take a Scotch judgment debt, statute barred in an English administration and of no value.

Register the judgment under the Judgments Extension Act, 1868, sec. 3. Now remove the hat and the judgment appears as a good claim against the English assets. This surprising transformation results from registration under the terms of the Act. It gives a new cause of action and so rehabilitates the debt. If this is not driving the conventional coach and six through an Act of Parliament, it is certainly circumventing the statutory bar. But one is not sorry to see this technical and sometimes unconscionable defence frustrated occasionally.

Testators must now read up Acts of Parliament very industriously, otherwise they may find their intentions sadly frustrated. This is the moral of *Re Bridger, Brompton Hospital for Consumption* v. *Lewis*, '94, 1 Ch. 297 (C. A.). The principle applied by the Court of Appeal is merely the old one that a will speaks as to the property comprised in it as from the testator's death, which is well enough if the language which the will uses is a testator's own and not imputed to him. But when a long and obscure Act of Parliament provides in some belated section that—'horse' in a will shall be deemed to include 'cows,' no one can feel sure of the effect of his testamentary intentions. *Re Bridger* is too suggestive of this. A testator gives all his pure personalty to a charity, and then a Mortmain Act comes and says that pure personalty is to include impure personalty and realty.

Etherley &c. Co. v. *The Auckland District Board*, '94, 1 Q. B. (C. A.) 37, follows *Hill* v. *Thomas*, '93, 2 Q. B. (C. A.) 333. It must now therefore be taken as finally settled, as far as the matter can be decided by the Court of Appeal, that the standard of comparison by which to determine whether traffic is 'extraordinary' within the meaning of the Highways &c. (Amendment) Act, 1878, sec. 23, is the ordinary traffic on the road in question, not that on other roads in the district. Whether this is really the meaning of the Act is at any rate open to doubt. The principle adopted by the Court of Appeal leads to the result that no traffic can in the long run be 'extraordinary,' for when it becomes habitual it must be the ordinary traffic carried over a particular road.

'Estoppels' said Lord Bramwell 'are odious.' Certainly they are not easy of application. *Foster* v. *Tyne Pontoon & Dry Docks Co.* (63 L. J. Q. B. 50) is an instance. It was a case of fraud by the secretary of a company, a fraud which it must be admitted had the simplicity of true genius. Meeting a member of the company the secretary said to him, 'Would you like some more of that stock?' The member said he would, and paid £300, and the

secretary sent him a transfer. Then he took more stock and received more transfers. The defect of all these transactions was that the transferor was a fictitious person. The secretary could not register or furnish certificates—it would have led to detection—but he did what he could, he sent dividend warrants on the stock in the name of the company to the stockholder, and so 'made his mind easy.' This was relied on as an estoppel against the company. But the Court on the authority of *Simm* v. *Anglo-American Telegraph Co.* held that the warrants did not amount to a representation of the transferee's title. Sending dividend warrants however is a stronger thing than the merely ministerial registration in *Simm* v. *Anglo-American Telegraph Co.* (5 Q. B. Div. 216). Moreover the recent case of *Balkis* v. *Consolidated Co.* (69 L. T. R. 598) seems to carry the principle of estoppel a good deal further than *Simm* v. *Anglo-American Telegraph Co.*

The unity of husband and wife may still have a mystical reality, but as a legal doctrine it is in ruins. We have now got so far that a husband is not 'interested' in a business carried on by his wife (*Smith* v. *Hancock*, '94, 1 Ch. 209), a highly convenient doctrine for a husband who wishes to evade a covenant he has entered into against rival trading. You have only to get your wife to set up business in her own name, write circulars *for her to* 'old friends' and so forth. The artifice is too transparent. *Incredulus odi.* But conveyancers will in future have to adapt the form of covenant to meet Kekewich J.'s decision, which in point of law seems right enough.

Bankruptcy is rightly recognized as an invaluable means of getting rid of your liabilities especially now the Legislature has made nearly everything proveable. But there is one liability which even bankruptcy will not extinguish, and that is the liability to maintain a wife. A bankrupt can no more rid himself of this than he can realize his wife as an asset. Hence alimony is not a proveable debt. The Court of Appeal so decided some time ago (*Linton* v. *Linton*, 15 Q. B. Div. 239), and now Kennedy and Vaughan-Williams JJ. have expressed the view that even arrears of alimony due at the date of the receiving order are not proveable (*Re Hawkins, Ex parte Hawkins*, '94, 1 Q. B. 25). This is a very practical question because bankrupts generally manage to have an income, and if they have they must on this very proper conclusion share with their partners for life. Persons about to marry must reckon with this state of the law before they 'venture.'

An equitable tenant for life of the male sex may be let into possession to manage his property on undertakings (*Re Wythes*, '93, 2 Ch. 369). Why not then a young married lady? Chitty J. saw no objection, nay, invested the lady with all the powers of a tenant for life under the Settled Land Acts (*Re Bagot*, '94, 1 Ch. 177). The rich young heiress or widow is a favourite conception of our dramatists and novelists, old and new, and there is no reason why the Lady Olivia should not do quite as well as Sir Toby. French wives are notoriously good at business,—Max O'Rell ascribes the wealth of France to their predominance in the shop and prudence in investing. English women are not much behind in the matter of driving bargains. Granted the capacity, it is an undeniable truth of human nature, that things are never so well looked after as by a person with an interest. Trustees may do their duty, but they cannot feel any burning zeal.

Judicial loyalty too often stereotypes bad law. Happily the bad law embodied in Malins V.-C.'s decision (*Hunt* v. *White*, 37 L. J. Ch. 326)—that covenants for title do not extend to a defect known at the time to the purchaser—seems to have been unknown to the profession, at least it had not got into the text-books, so the Court of Appeal had no scruples in overruling it: *Page* v. *Midland Ry. Co.*, '94, 1 Ch. 11 (C. A.). Malins V.-C.'s decision, if it stood, would destroy nearly the whole value of covenants for title. It is instructive to compare or contrast with *Page* v. *Midland Ry. Co.* the principles laid down by Tindal C.J. in *Margetson* v. *Wright* (5 M. & P. 606) that a person who buys a horse with a warranty of title cannot sue the seller on the warranty for a defect, say of blindness, which he, the buyer, knew of at the time he bought the horse. In the latter case the blindness is an actually existing disparagement of value in the thing sold abating the price; in the former the defect is in the title, not in the thing. It may never affect the purchaser at all, and being fortified by the covenant does not usually abate the price.

Infants have many privileges, and one of them is that if an infant witness in a criminal case breaks the condition of his recognizances with the Crown, his recognizances cannot be estreated being a matter of contract. The practical result of this is that if a witness necessary for a prosecution is an infant, he should be subpœnaed. Then if he disobeys the subpœna he may be attached (*Reg.* v. *Ernest W. Smith*, 17 Cox. C. C. 601).

Ultzen v. *Nicols*, '94, 1 Q. B. 92, may be studied with satisfaction by anyone who dines at eating-houses. The result of the case is that if a customer of such a house gives his coat to a waiter to hang up, and the coat being hung up is stolen, the jury may find the keeper of the house liable in damages for the loss of the coat, and in such a case the verdict which the jury may give they will give. The moral for the customer is that he had better not hang up his coat for himself. Here, as elsewhere, the principle applies, 'Never do for yourself what you can get another person to do for you.'

In Goods of Tamplin, '94, P. 39, is in one sense a mere decision on a point of practice, and the circumstances of the case look at first sight specially complicated; yet, like many other decisions as to points of practice, it in reality determines or affirms a general and simple principle. The principle which the case illustrates is this: that our Courts will not grant probate of a will dealing solely with immoveable property in a foreign country. *In Goods of Tamplin* should be read together with *British South Africa Co.* v. *Companhia de Moçambique*, '93, A. C. 602. The two decisions both exhibit the fixed refusal of our Courts to deal in any way with the determination of rights to foreign land, and this sound resolution, whatever its historical origin, affirms one of the most fundamental principles of private international law, viz. that the Courts of a country ought not to determine matters as to which they cannot give an effective judgment.

Bowen v. *Anderson*, '94, 1 Q. B. 164, with which should be read *Sandford* v. *Clarke*, 21 Q. B. D. 398, and *Jones* v. *Mills*, 10 C. B. N. S. 788, ought to dispel the delusion, which by the way has influenced the whole of our legislation with regard to County Courts, that an unimportant case, that is, a case not involving a claim to heavy damages or to valuable property, must be a simple case. *Bowen* v. *Anderson* is as unimportant a case as one can find. The only practical matter to be determined is whether *A*, who treads on a loose coal-plate, and falls into the hole which it ought to cover, and thereby breaks his leg, can recover damages of probably no great amount from the landlord of the house in front of which the plate stands. The defence of *X* the landlord is in substance that *A*'s remedy (if any) is against *Y* the tenant of the house, and when this question comes to be carefully considered it is found to raise among other points the inquiry, what is the true position of a weekly tenant? Is he a person who takes a house for a week, and to whom, if the tenancy continues, the house is re-let weekly,

or is he a person who takes a house for an indefinite period from week to week, subject to have his tenancy determined by due notice, which may perhaps mean as much as a week's notice? The Queen's Bench Division, represented by Wills J. and Collins J. —than whom it would be difficult to find two more competent lawyers—have now decided, following *Jones* v. *Mills*, that the position of a weekly tenant is that of a tenant who holds for an indefinite period, subject to the determination of his tenancy by reasonable notice to quit. But not more than six years ago, Mr. Justice Wills, as he himself with characteristic and admirable candour points out, decided in effect that in the case of a weekly tenancy a house was re-let to the tenant every week. The right of the plaintiff in *Bowen* v. *Anderson* to recover damages for breaking his leg was therefore found to depend on the answer to a question of law so uncertain that a first-rate lawyer might without discredit give a wrong reply to it. An unimportant case therefore turns out to be a most difficult case.

Bowen v. *Anderson* is interesting from another point of view. The abolition or simplification of forms of pleading has led to an idea that the choice of parties to an action is no longer of any great importance. In one sense this is true. An error as to parties can now in most cases be amended and therefore involves no more than a certain loss to the plaintiff in the matter of costs. Still, that the right plaintiff should direct his action against the right defendant, or, in other words, the choice of parties, must always at bottom be a matter of essential importance. It lies at the very basis of every attempt to enforce a legal right, and the necessity for a right choice cannot be got rid of by any change in the system of pleading. In *Bowen* v. *Anderson* the question to be determined was in reality, who was the proper defendant, was it the landlord *X*, or the tenant *Y*? In other words, the case raised a question as to the selection of parties.

Bond v. *Plumb*, '94, 1 Q. B. 169, is in itself an unimportant decision. It determines that a betting agent who had violated the spirit had also broken the letter of the Betting Act, 1853, 16 & 17 Vict. c. 119. It however reminds us that though his conduct was opposed to the whole spirit of the Betting Act, he would have escaped punishment if it could have been shown that his case did not fall within the exact words of a singularly ill-drawn enactment. We are thus forced, not for the first time, to consider a question which has frequently been raised in these pages. Is it reasonable

that our judges should apply to statutory enactments a system of interpretation far narrower than that which they apply to the interpretation of Common Law maxims? The inquiry deserves a careful answer, for until a satisfactory reply is discovered many lawyers, who are not in the least opposed either to reform or even to innovation, will continue to deprecate the codification of the law. They dread that the broad principles of the common law, when reduced to a statutory form, should be interpreted not in accordance with their spirit, but simply in accordance with their letter.

Does the elector for a particular borough possess a legal right to have a petition presented to the House of Commons by the M.P. for the borough?

Chaffers v. *Goldsmid*, '94, 1 Q. B. 186, answers this question in the negative. The oddity of the thing is that any man with education enough to make the inquiry should have thought that it could seriously be raised before a Law Court. The notion that the Queen's Bench Division would under any circumstances issue a mandamus to the member for the Southern Division of St. Pancras commanding him to present a petition to the House of Commons, is on the face of it so absurd that one wonders it could seriously enter into the mind of any Englishman. But the ridiculousness of Mr. Chaffers' action does not end here. It rests on the belief, which is more prevalent than educated men suppose, that the member for a borough or county is under some special legal obligation to his constituency. This idea contradicts the whole theory of our constitution. For it is elementary knowledge that the member for St. Pancras is, when once elected, under the same obligations as any other M.P. He is a Member of Parliament. His duties whether legal or moral are duties owing to the nation, and not duties owed to St. Pancras or to the electors thereof.

A guaranty which is a guaranty and nothing more, is unenforceable if made by word of mouth; a guaranty which is something more than a guaranty, e.g. is part of an arrangement to share profits, is enforceable though made by word of mouth. This is the broad effect of *Couturier* v. *Hastie*, 8 Ex. 40, which is followed in *Sutton* v. *Grey*, '94, 1 Q. B. (C. A.) 285. Against the legal soundness of a distinction created by the subtlety of Parke B. we have nothing to object. But that it is a distinction grounded on common sense is a thesis we should be sorry to maintain. It is one of the endless niceties which are due to the feeling of our judges that the 4th and 17th sections of the Statute of Frauds have worked injustice. Is it

not time to consider whether the provisions of the Statute (a portion of which have been at once repealed and re-enacted by the Sale of Goods Act, 1893) and all the refinements to which these provisions have given rise should be done away with? Scotland prospers, and the 4th and 17th sections of the Statute of Frauds are unknown to Scotland.

Shaw v. *G. W. R. Co.*, '94, 1 Q. B. 373, is a singular example of a case of some general importance being decided on a ground not taken in the argument at all. The effect of the decision is that loss of goods carried by railway, when due to a wilful wrong of a servant of the Company, such as theft, outside the scope of his employment, is not within s. 7 of the Railway and Canal Traffic Act, and therefore the Company remains free to exempt itself by special contract within the saving of s. 6 of the Carriers Act of 1830, without regard to the contract being reasonable or not within the meaning of that term in the Railway and Canal Traffic Act. The Company may be said to be in luck: but we confess that we have little sympathy for parties who send valuables as common luggage undeclared and uninsured, and then expect to recover the full amount.

There is no doubt in fact that s. 2 of the Partnership Act, 1890, was not intended in any way to alter the law as settled by *Cox* v. *Hickman*, 8 H. L. C. 268, and explained in later cases, as to the extent to which receipt of a share of profits is evidence of partnership. North J., after carefully examining the language of this part of the Act, concluded that it gave effect to the decisions which were the ultimate authorities when the Act was passed, and that it might properly be illustrated by them: *Davis* v. *Davis*, '94, 1 Ch. 393.

Is the registered proprietor of a London cab responsible for acts of negligence committed by the driver who is not his servant, but has hired the cab? *King* v. *Spurr*, 8 Q. B. D. 104, answers this question in the negative. *King* v. *London Improved Cab Co.*, 23 Q. B. Div. 281, answers the question in the affirmative, and is followed by *Keen* v. *Henry*, '94, 1 Q. B. (C. A.) 292. This reply is satisfactory to every Londoner who is not a cab-owner, but, be it remarked, it can give no satisfaction to any one who is injured by a cab-driver's negligence out of London, for the cases we have referred to apply solely to cabs within the terms of the London Hackney Carriages Act, 1843, 6 & 7 Vict. c. 86, and imply, if they do not affirm, that except for the terms of that Act, the proprietor of a cab is not responsible for the negligence of a driver who has hired it. Why

the cab-owners of London should be under more stringent liabilities than the cab-owners of other cities, is a question which, like many other legal inquiries, can be answered only by the wisdom of Parliament.

A Divisional Court has held in *James* v. *Jones*, '94, 1 Q. B. 304, that baking powder is not an article of food. The nearest approach to a precedent with which we are acquainted is a decision (we believe not reported) of the Chief Court of the Panjáb that rifle cartridges capped but not filled with powder were not ammunition: a decision which the Government of India most properly instructed its executive officers to disregard. In *Bakewell* v. *Davis*, *ib.* 296, another Divisional Court upheld a conviction under the same statute, but with the curious reluctance so often shown by English judges to give effect to the plain meaning of the Legislature.

The *Revue du droit public et de la Science politique en France et à l'étranger*, edited by M. Ferdinand Larnaude, and published by MM. Chevalier-Marescq et Cie, claims to fill a palpable gap in the treatment of politics and public law. Both M. Larnaude's prefatory announcement and the contents of the first number give good promise.

Will the wonderful theological circular lately issued by the London School Board become a subject of judicial construction? It seems to throw us back to the days of 'Essays and Reviews.' But we fear there is no such luck in store for the profession.

It seems convenient to repeat in a conspicuous place that it is not desirable to send MS. on approval without previous communication with the Editor except in very special circumstances; and that the Editor, except as aforesaid, cannot be in any way answerable for MSS. so sent.

THE CASE OF *THE ZETA.*

THE House of Lords have arrived at the reasonable and right decision of *Mersey Docks & Harbour Board* v. *Turner*, *The Zeta*, '93, App. Ca. 468. Had it not been for the decision of the Court of Appeal in *Reg.* v. *Judge of the City of London Court*, '92, 1 Q. B. 273, neither that Court nor the House of Lords would have been troubled with *The Zeta*. As it is, the two cases stand together, and the earlier case is not overruled; but *The Zeta* shows at any rate that much that was said by the members of the Court of Appeal in the City of London Court case with reference to the history and jurisdiction of the Admiralty Court is not law. In both cases the view of the Court of Appeal was that the Admiral's jurisdiction in the case of damage to ships was limited to proceedings against the owner of the ship that does the damage, and therefore to cases of collision between two ships. It is not difficult to see how this idea has grown up. The rapid increase of collision and salvage cases in recent times, the absence of any reports of Admiralty Court Instance cases of earlier date than the present century, the decrepit condition of the Court during the preceding century, and the fear of prohibition which (not without cause) has possessed even such oracles of the Admiralty as Lord Stowell and Dr. Lushington, have given rise to the belief that the Admiral's jurisdiction no longer exists except in the narrow classes of cases of which instances are to be found in the books. There is nothing in the records of the Court to justify this doctrine. For a century before Lord Coke's time the records are voluminous and complete; and they show that of the multifarious matters litigated in the Court during that period collisions and salvage were amongst the rarest.

Putting aside the vast number of shipping and mercantile cases founded upon contract, we find that torts of various kinds were habitually tried and adjudicated upon in Admiralty. Thus in 1574 *The Anne* was lost by striking upon an unbuoyed wear set up in the sea by one Richmond of Harwich. Her owner Wolmer sued Richmond in Admiralty. This is the case which Fry L.J. in *The Zeta* suggested as possible, but which the Master of the Rolls scouted as impossible. The Lord Justice was right, both in his imaginary case and in his law. Cases of ships holing themselves by sitting upon unbuoyed anchors are common. Those of *The Susan* (1663) and of *The Mary* (1703), to which attention was called in

these pages, were relied upon by the Lord Chancellor in *The Zeta*; and they are but two amongst many others. They illustrate, however, the rapidly changing character of the business which must of necessity come before a Court that deals with maritime matters, the conditions of which are constantly changing. During the seventeenth and eighteenth centuries the danger of unbuoyed anchors was a real and a common one; in these days of ships that do not take the ground and of floating docks it seldom occurs. But the prominence of the subject in the records of the Court and in the mediaeval codes of maritime law show that it was at one time as common a cause of action as collision has become in these later days. Again, it was asked by the Court of Appeal in one of the recent cases, by way of a *reductio ad absurdum* of the argument that torts other than negligence causing collision were triable in Admiralty, whether slander was within the Admiral's jurisdiction. So far as the records show, it certainly was. In *Raynes* c. *Osborne* (1579) a sentence was passed for £50 damages for slander. The case next before it upon the file is a slander action in which £100 was recovered for damages. And there are many other slander suits; and so far as the present writer is aware, no one of them was stopped or attempted to be stopped by prohibition. There would be no difficulty in naming many other wrongful acts for which damages were recovered in Admiralty.

It seems not improbable that the Admiral's Court was originally instituted to deal effectually with cases of 'spoil'—in other words, piracy. The *causa spolii* is a very frequent, probably the most frequent, form of action in Admiralty throughout the sixteenth century. It was a civil action to get restitution of ships or goods piratically taken at sea *si extent, alioquin*, to recover damages. The practical extinction of piracy in the last century accounts for the non-exercise of the jurisdiction in such cases for many years; but in the face of the records of the Court it could scarcely be denied that the jurisdiction formerly existed and still exists. Yet, but for a casual reference to the matter by Lord Stowell in *The Hercules*, 2 Dods. 353, its existence would probably have been unknown. Although, as the Coram Rege Rolls show to have been the case, the jurisdiction of the Common Law Courts originally included torts committed at sea, from about the year 1364, these Courts appear to have abstained from exercising it and to have acquiesced in the exercise by the Admiral of his patent jurisdiction in such matters.

An examination of the prohibitions issued before the days of Lord Coke which are preserved amongst the records of the Admiralty—and there seems to be no reason to suppose that the few which are missing were in different terms—shows that they

all proceed upon the Statutes of Richard the Second, 13 Ric. 2, c. 5 and 15 Ric. 2, c. 3; and that the reason of every prohibition was an alleged exercise by the Admiral of his jurisdiction over a matter arising *infra corpus comitatus.* In the scramble for work and fees which raged throughout the sixteenth and first half of the seventeenth centuries, it seems to be not improbable that the common law practitioners made good use of the fiction of a false venue, and that they succeeded in obtaining prohibitions against their rivals of the civil law in some cases where the cause of action did in fact arise at sea; but the terms of the writs show that in no case was it the subject-matter of the action that caused the prohibition to issue, and that it was always the suggestion, which true or false could not be traversed, that the cause of action arose *infra corpus.*

During the period at which the *causa spolii* was so common a form of action, collision cases were very rare. Throughout the sixteenth century the number of sentences passed in collision cases may be counted on the fingers; whilst the number of spoil cases runs to hundreds, probably to thousands. So prevailing was the 'spoil' action that in some of the earlier cases of collision the language of the allegations in spoil suits is used in those of collision cases. *Spoliavit et fregit, impetum fecit in* and similar phrases indicate that the collision action is the lineal descendant of the *causa spolii.*

The question having now been raised afresh, there is every prospect of the House of Lords having to review the whole question of Admiralty jurisdiction, and to say by what authority it exercised the extensive jurisdiction in 'civil and maritime' cases, which it did in fact exercise for centuries before the days of Lord Coke. The ostensible authority of the Admiral during the sixteenth and seventeenth centuries was derived from the letters patent of his appointment. These are extant and purport to confer a jurisdiction over all tidal waters, altogether giving the go-by to the Statutes of Richard II. There can be no doubt that the omission in the patents of this period of any reference to these Statutes was intentional, for in the patents of the previous century the jurisdiction is limited by express reference to the Statutes of Richard. It is no less certain that the question of the validity of the patents of the sixteenth and seventeenth centuries must have been considered by the common law judges, and that they were held to be invalid so far as they were contrary to the Statutes of Richard. It is singular, however, that the point is not the subject of any reported case, and that although the prohibitions all recite and proceed upon

the Statutes of Richard II, there is no reference in any one of them to the terms of the patents. Similarly in Lord Coke's well-known *Articuli Admirallitatis* the contention of the civilians as to *non obstante statuto* is passed over in contemptuous silence. Oddly enough most of the collisions during the sixteenth and early part of the seventeenth centuries were in the Thames at or near London; yet in no case until *Hall* v. *Cook*[1] was the Admiralty Court prohibited, although the collision occurred within the body of the county. The prohibitions issued by Lord Coke, and subsequently to his time, are not amongst the Admiralty records; and it is not possible without a laborious search of the records of the Common Law Courts to say upon what grounds they issued.

With reference to the *City of London Court* case, where the question was as to the jurisdiction of the Admiral to entertain a suit against a pilot for negligence in damaging another ship, it may be mentioned that suits against pilots for loss of ships and cargoes through their negligence were formerly common. *Domries* v. *Lies* (1564) is one amongst several; but the case mentioned in the Court of Appeal, *Russell* v. *Hayes*, is not a pilot's case[2].

It is hoped that the Selden Society will before long issue a volume of extracts from the records of the High Court of Admiralty during the sixteenth century. The records begin about 1520, and show that until Lord Coke laid his hand upon the Admiralty Court, the amount of shipping and mercantile business transacted by it was very large. Insurance, bills of lading, average, bills of exchange, and charter parties were familiar to the Admiralty practitioners probably for many years before they formed any considerable part of the business of the Common Law Courts at Westminster. It is to the records of the Admiralty Court that historians of English commercial law must look for the earliest decisions upon such matters.

R. G. MARSDEN.

[1] This case (circa 1615) is probably that referred to in *Violet* v. *Blague*, Cro. Jac. 514.

[2] The writer takes this opportunity of pointing out that by a mistake for which he is responsible, the Court of Appeal (1892, P. 283) were misled into supposing that *Russell* v. *Hays*, Marsden's Ad. Ca. 307, was a suit against a pilot. John Hays was a *naupegus* (ship's carpenter). The record was produced to the Court of Appeal, but the misprint, *naugogus* for *naupegus*, escaped the notice of the Court as it had that of the editor of the report.

THE PRINCIPLE OF BETTERMENT IN ITS LEGAL ASPECT.

IN the following remarks I propose to consider the subject of 'Betterment' purely from a legal point of view, and to confine the term to the sense in which it has been much used and much canvassed in this country during the last few years. In America 'betterment' is applied to cases where the property of one man is improved by or at the expense of another man. But in England we use the term exclusively in a technical sense and in reference to cases where the property of certain individuals derives a special enhancement in value from an improvement made for the public benefit and at the public expense.

The first Report of the Royal Commission on the 'Housing of the Working Classes,' presented in 1885, defined *betterment* in relation to the subject-matter of the Report as 'the principle that rates should be levied in a higher measure upon the property which derives a distinct and direct advantage from an improvement, instead of upon the community generally, who have only the advantage of the general amelioration in the health of the district' (p. 47). This principle was recognized by our Legislature in one solitary instance more than two centuries ago. It was again to a small extent adopted in 1879 and 1882. But during the last four years it has become the subject of wide discussion in consequence of the proposal on the subject for which the London County Council sought the sanction of the Legislature in the Bill introduced by them into Parliament in the Session of 1890 to enable them to widen and improve the Strand. The controversy to which this proposal has given rise has hitherto prevented the Bill from becoming law; but the Council are bent on carrying out their policy if possible. It may therefore be useful to examine the question from the standpoint of pure law, and to inquire how far, if at all, the doctrine of 'betterment' is in accord with the principles of justice and equity. In so doing, we shall naturally be led into the discussion of the concrete law of our own and other countries upon the subject and upon other kindred topics. Concrete law is not always in harmony with abstract law, and where the two are out of accord, we should not hesitate to point out the fact. But the legal systems of civilized countries are for the most part in agreement with the recognized principles of justice

and equity; these principles being generally at the base of the systems, though, in some cases, positive laws have moulded, rather than followed, the received notions as to what is just and equitable.

In dealing with a comparatively novel subject, it is useful and sometimes even inevitable that we should proceed by analogy. As Sir Edward Coke says (Co. Litt. 191 a) *argumentum a simili* is good in law. The same may be said of *argumentum a contrario.* And in seeking to arrive at a right conclusion on the, comparatively speaking, new point which we are investigating, it will not be otherwise than pertinent to review the well-established law on the subject of what we may call 'worsement,' or the injuriously affecting of neighbouring property by the execution of public works, and also to consider the doctrines of law in reference to similar questions between private parties, and to note what are the legal rights or obligations of a man whose property is damaged or improved by the mode in which another individual deals with property of which this latter individual is *de facto* in peaceable possession. We shall then, I think, come to the conclusion that the principle of betterment is, in law, just and equitable, but that, like the counter principle of 'worsement' or the injuriously affecting of property, it ought to be applied only in clear cases and subject to strict regulations and conditions, if we would prevent it from becoming iniquitous and oppressive.

It will be convenient to remark, before proceeding further, that throughout this dissertation, I use the word 'property' as a short and convenient, though not, technically, very accurate expression, to denote real property of any kind, and any tenure, including hereditaments held merely for a term of years or any less chattel interest.

In all communities which have attained to any degree of civilization, the maxim *Sic utere tuo ut alienum non laedas* must necessarily be more or less recognized and acted upon. But in no legal system is it enforced in its full rigour. Take, for instance, our own law. *A* owns a piece of land adjoining *B*'s house and garden. If *B*'s house has stood there for twenty years, *A* cannot build on his land so as materially to diminish the light from any of *B*'s windows which have been in existence during the whole of that period. But short of this he has a perfect right to build so as to overlook *B*'s windows or his garden, and so substantially diminish the market value of the house as an agreeable residence; and, if *B*'s windows have been in existence a day short of twenty years, he may also build so as entirely to block them up; although his doing so will not inflict one penny less of injury on the house than would have been inflicted by blocking up windows which had been in existence for a score of years and upwards. *A* may also with

impunity diminish the value of *B*'s house by using his own land for any unsightly or otherwise unattractive purpose, which falls short of being an actual legal nuisance. The maxim, in fact, in its trite form, is hardly correct. It should rather run thus: *Sic utere tuo ut aliena jura non infringas.* What a man's *jura* with regard to his own property are, must, of course, in the absence of express or implied contract depend on the general law prevailing in the country wherein the property is situated. But whatever they may be, the infringement of the rights by dealings with the property itself on the part of a person temporarily in occupation of it, or by dealings with neighbouring property on the part of a person entitled to that neighbouring property, gives a right of action to the aggrieved individual, and a remedy in the shape either of pecuniary damages or of an injunction to restrain the injurious act, according to the circumstances of the case, and, sometimes, according to the option of the plaintiff.

The law as to 'worsement' or the injuriously affecting of property by neighbouring land being taken for public works, and these works being executed upon it, is founded upon the existence, as between neighbouring individual proprietors, of the rights to which allusion has been made. When in the interests of the community at large, and in accordance with the doctrine *Salus rei publicae suprema lex*, the compulsory taking of land, *nolente volente* the owner, is sanctioned by the Legislature for the purpose of some undertaking of public importance which cannot be carried out without this compulsion, it becomes necessary, on the one hand, to extinguish all rights of action which would otherwise have arisen in consequence of the carrying out of the undertaking in the manner contemplated by the Legislature, and, on the other hand, to provide an alternative remedy for the individuals who are deprived of these rights of action. The persons whose land is actually taken for the undertaking are the parties primarily aggrieved, and methods are always provided by which they may obtain not only the full price for the land actually taken, but also compensation for any damage which they may personally sustain by reason of other land of theirs being injuriously affected either through its severance from the bulk of the estate by the abstraction of the land taken for the undertaking, or in any other respect through the carrying out of the undertaking. But in the special Acts passed for public undertakings prior to 1845, and in the Lands Clauses Consolidation Act of that year (sect. 68), there is also to be found provision for compensation to persons who have none of their property actually taken for the purposes of the undertaking, but whose property is nevertheless injured

by the carrying out of the undertaking in the manner sanctioned by the Legislature. As this provision is the exact reverse of the principle of 'betterment,' it is important to examine closely the conditions under which the compensation is given. In the first place, it is confined to cases where the deterioration of the property is occasioned by some act or matter in connexion with the undertaking, which would have been actionable in the absence of statutory authorization, but which is within the powers given by the Legislature to the promoters of the undertaking, and for which, therefore, no right of action lies (*Glover* v. *North Staffordshire R. Co.*, 16 Q. B. 912). The Gasworks Clauses Act, 1847 (10 & 11 Vict. c. 15) contains a clause (sec. 29) that nothing in that Act or in any special Gas Act shall prevent a Gas Company from being liable to an indictment for nuisance or to any other legal proceeding in consequence of making or supplying gas. Where, therefore, adjacent property is deteriorated by a nuisance arising from gas works, the remedy is to be sought in an action for damages, and compensation cannot be obtained under the 'worsement' provision of the Lands Clauses Act (*Broadbent* v. *Imperial Gas Co.*, 7 De. G. M. & G. 436; aff. 7 H. L. Ca. 600; 5 Jur. N. S. 1319). Nor can this compensation be obtained for injury done by an act of the promoters of the undertaking which is not within their statutory powers, or by a negligent and improper use of those powers. In such cases also the remedy is an action for damages (*Rex* v. *Hungerford Market Co.*, 1 A. & E. 668; *Laurence* v. *Great Northern R. Co.*, 16 Q. B. 643; *Biscoe* v. *Great Eastern R. Co.*, L. R. 16 Eq. 636; *Norton* v. *London and North Western R. Co.*, 9 Ch. D. 623). In the next place, the injury for which the compensation is given must be to the property itself, or have some reference to the property or its incidents. The language of the provision on the subject in the Railways Clauses Consolidation Acts, 1845 (8 & 9 Vict. c. 20, ss. 6, 16; c. 33, s. 6), with respect to railways in all parts of the United Kingdom is somewhat wider than the corresponding provisions of the Lands Clauses Consolidation Acts, 1845 (8 & 9 Vict. c. 18, s. 68; c. 19, s. 20), with respect to public undertakings generally. Where no land of the aggrieved party is actually taken, the Lands Clauses Acts only contemplate compensation being awarded to him in respect of the property of his which is injuriously affected by the works of the undertaking. The Railways Clauses Acts, on the other hand, direct that he shall receive, in like manner as if land of his had been actually taken, full compensation for all damage sustained by him, by reason of the exercise, as regards his property which has been injuriously affected, of the statutory powers given to the promoters of the undertaking. But in the case of *The*

Caledonian R. Co. v. *Walker's Trustees* (7 App. Ca. 259), decided in 1882, Lord Selborne laid down the following propositions as applicable to the wider provisions of the Railways Clauses Acts:—'(1) When a right of action which would have existed if the work in respect of which compensation is claimed had not been authorized by Parliament, would have been merely personal, without reference to land or its incidents, compensation is not due under the Acts; (2) When damage arises, not out of the execution but only out of the subsequent use of the work, then also there is no case for compensation; (3) Loss of trade, or custom, by reason of a work not otherwise directly affecting the house or land in or upon which a trade has been carried on, or any right properly incident thereto, is not by itself a proper subject for compensation; (4) The obstruction by the execution of the work of a man's direct access to his house or land, whether such access be by a public road or by a private way, is a proper subject for compensation.'

It should be observed that these axioms do not apply where property, besides being in part injuriously affected, is in part actually taken to be used for the works about to be executed. It has always been held that where some land of a person is actually taken by a public company or body for the purposes of their undertaking, that person is entitled to compensation for items of pecuniary loss sustained by him in connexion either with the land taken or with any adjacent land of his, for which he would not have been entitled in connexion with adjoining land of his, if no land of his had been actually taken for the undertaking. (*Re Stockport, Timperley & Altrincham R. Co.*, 10 Jur. N. S. 614; 33 L. J. Q. B. 251; *Duke of Buccleuch* v. *Metropolitan Board of Works*, L. R. 5 H. L. 418, at pp. 446, 458; *Cowper Essex* v. *Local Board for Acton*, 14 App. Ca. 153.) Some diversity is also inevitably introduced into the application of the axioms by the fact already noticed of the language of the English and Irish and Scotch Railways Clauses Acts, 1845 (which of course only relate to railways), as regards the damage for which compensation is obtainable, being much wider than that of the two Lands Clauses Acts, 1845, for the United Kingdom, which relate to all public undertakings. An instance of this diversity is afforded by the case of *Re London, Tilbury & Southend Railway Company and Trustees of Gowers Walk Schools* (24 Q. B. D. 40; aff. 326). The railway company had interfered with the access of light to windows, some of which were ancient lights and some not; and it was held that under the Railways Clauses Act, 1845, they were bound to pay compensation for their interference not only with the old lights but also with the new; although, of course, no action could have been brought

against them for blocking the latter. I conceive, however, that this decision might have been upheld even under the stricter language of the Lands Clauses Act, 1845, on the ground that the Company in interfering with ancient lights were actually abstracting an easement, or, in other words, taking possession of a hereditament, and that the owners, therefore, fell within the category of persons whose property was not merely injuriously affected, but was actually in part taken.

In the present inquiry, however, we are only concerned with the cases where property of a person is injuriously affected by an undertaking, for which none of his property is actually taken. In such cases the provisions of the Railways Clauses Acts, as distinguished from those of the Lands Clauses Acts, have been held to entitle the owner of property which is structurally damaged and depreciated in value by the construction of a railway, to compensation also for damage occasioned by that construction to goods lying upon the property (*Knock* v. *Metropolitan Railway Co.*, L. R. 4 C. P. 131); although if the property had not been itself injuriously affected, no compensation could have been obtained in respect of the goods. But in a case decided nearly sixty years ago the London Docks Company, under their Acts which contained compensation clauses, were held not liable to compensate the tenant of a public-house, for loss sustained by him through the pulling down of neighbouring houses and obstruction of access to the public-house in connexion with an improvement in the docks, which had occasioned a diminution of his customers and had lessened the selling and letting value of his premises as a public-house though not as a private residence (*Rex* v. *London Dock Co.*, 5 Ad. & Ell. 163). And the same principle has been sustained by later decisions (*Cameron* v. *Charing Cross Railway Co.*, 19 C. B. N. S. 764; *Rickett* v. *Metropolitan Railway Co.*, L. R. 2 H. L. 175). On the other hand, where the construction of a railway embankment on a portion of the highway opposite a house had the effect of narrowing the road from fifty to thirty-three feet and thereby obstructed the access of light and air to it and materially diminished its selling and letting value, the owner was held entitled to compensation from the railway company (*Beckett* v. *Midland Railway Co.*, L. R. 3 C. P. 82). The broad fact, however, remains that there is a numerous class of persons injured by the construction of a railway for whom the Legislature has not provided compensation (*Bailey* v. *De Crespigny*, 10 Best & Sm. 1, at p. 16 [1]), and it may be added that the class is still more numerous

[1] The most recent illustration of this is furnished by the case of *Att.-Gen. & Hare* v. *Metropolitan Railway Co.* (L. R. [1894] 1 Q.B. 384), in which the Court of Appeal delivered judgment on Dec. 4, 1893, reversing the decision of Wright J. in the Court below.

in the case of other public works, in respect of which compensation is regulated by the Lands Clauses Act alone and not by the Railways Clauses Act. In this branch of the law, as well as in others, there is no such principle as *ubi damnum ibi remedium.* It is only true that *ubi jus* or *ubi injuria, ibi remedium* ; and there are plenty of cases of *damnum sine injuriâ.*

Let us now turn to the other side of the question, and consider the legal rights and obligations which arise in cases where a man's property is improved or bettered by the act of another individual, or by the execution of public works. It will be convenient to treat this second branch of the subject in the same order as was adopted in reference to the deterioration of property, and to consider it first as between two private individuals. The principle of paying damages or compensation for the depreciation of property rests, as we saw, upon the legal maxim *Sic utere tuo ut alienum non laedas.* The principle of receiving remuneration or compensation for the amelioration of property rests upon two other maxims, *Qui sentit commodum sentire debet et onus* and *nemo debet locupletari aliená jacturâ.* The former maxim, as we have observed, is of by no means universal application ; and, in the same way, the latter pair are, in our law, much limited in their operation. But there is probably no legal system in which their range is so restricted as our own. Under the Roman law a person who in good faith entered into possession or occupation of property which in fact belonged to another, and executed improvements upon it without that other's knowledge or consent, was entitled, upon being afterwards ejected by the true owner, to be reimbursed the costs of the improvements, so far as the property was, in consequence of their having been made, augmented in value at the time when the true owner recovered possession (Dig. lib. vi. tit. 1, § 48 ; Inst. lib. ii. tit. 1, §§ 30, 32). But having regard to the possibility that the true owner might be unable to pay the amount of the costs, or might prefer that the property should have remained in its unimproved state, the judge was empowered to modify the rule according to circumstances, and the ejected occupier was permitted, at his option, to remove from the property the materials of the improvement instead of receiving compensation (Dig. lib. vi. tit. 1, § 38). The same principles have been affirmed in modern times by the great French jurist Pothier, who points out the distinction between an outlay made by a *de facto* possessor upon the property of another, according as it is made either (1) for the discharge of the property from an incumbrance, or (2) for its preservation, or (3) simply for its amelioration. He lays down that if the possession was *mala fide,* the possessor has only a right to reimbursement in the first

two cases; but if his possession was *bona fide*, he has also a right to recoupment in respect of the expenses incurred by him in ameliorating the property. Pothier, however, adds that this right is subject to certain limitations. The *bona fide* possessor has no right to be reimbursed precisely and absolutely the amount which he has laid out, but only the amount by which the value of the thing is, at the time of its recovery by the true owner, augmented in consequence of the outlay; and this last limitation is further subject to qualifications according to circumstances (*Traité du Droit de Domaine de Propriété*, IIe Partie, chap. I. De l'Action de Revendication, Art. 6. §§ 343–349).

This principle of compensation for improvements was recognized in the *Code Napoleon* in the case of recovery by the true owner from a person in possession (Liv. II. Tit. ii. § 555) and also (Liv. III. Tit. vi. §§ 1632–1634) in case of a sale of property to a purchaser who then improved it and was subsequently evicted by a title paramount to that of the vendor; and likewise in the case of an heir who on coming into a succession had to restore to his coheirs property which he had received from the ancestor by donation during life and which he had improved after it had been given to him. In such a case he was to be entitled to reimbursement of the costs of the improvement, regard being had to the augmented value of the property at the time of its surrender to the coheirs, and he was permitted to retain possession of the property until he was so reimbursed (Liv. III. Tit. i. §§ 845, 861, 867). But it was laid down, on the other hand, that a usufructuary cannot at the conclusion of his usufruct claim any indemnity for improvements which he may pretend to have made, although the value of the property may have been augmented thereby (Liv. II. Tit. iii. § 599). The principle under consideration has also been introduced very generally into the United States of America by statutes known there as Betterment Laws. But it has only been very sparingly recognized in our own legal system. It has been adopted by our statute law in the case of agricultural improvements, for which the recent legislation of 1875 and 1883 (38 & 39 Vict. c. 92; 46 & 47 Vict. c. 61) has enabled a tenant on giving up his holding to obtain compensation from the landlord, and in the case of permanent improvements executed by a tenant for life, the cost of which he is in certain cases entitled to throw upon the inheritance or *corpus* of the property. And, independently of statute law, it has been decided by our courts of equity that a mortgagee who has entered into possession of the mortgaged property and has expended money in the permanent improvement of the property with notice to and tacit acquiescence on the part of

the mortgagor, is entitled, as against the mortgagor seeking to redeem the mortgage, to a reimbursement in respect of that expenditure, so far as it has actually increased the selling value of the property. But the improvements must be of a reasonable nature, and must not be of such an extent as to make it impossible for the mortgagor, with his means, to redeem the property, for that would be to improve him out of his estate. And if the mortgagee has actually sold the property at an enhanced price owing to improvements which he has made in it, the question whether the mortgagor had or had not notice of the improvements is immaterial. In either case the mortgagee is entitled to reimburse himself in respect of the improvements out of the purchase-money which has been augmented in amount thereby (*Sandon* v. *Hooper*, 6 Beav. 246; *Shepard* v. *Jones*, 21 Ch. D. 469). It has also been held in equity that if one of several joint purchasers lays out money in the repair or improvement of the property and dies, this shall be a lien on the property in favour of the representatives of the deceased (*Lake* v. *Gibson*, 1 Eq. Ca. Ab. 294; 1 Wh. & Tud. L. Ca. 6th ed. 215). Our law also recognizes to a limited extent the principle of the maxim *Qui sentit commodum sentire debet et onus*, by requiring that where a person has the opportunity or option of taking or receiving a property or a benefit which is subject to or coupled with a burden or obligation, he cannot take the property or benefit without rendering himself liable to the burden or obligation. Thus a purchaser of a leasehold interest becomes, by privity of estate, liable to the lessor for the performance and observance of the lessee's covenants and conditions contained in the lease. And where by a will beneficial and onerous legacies are given together as one entire gift, or there is an evident intention on the part of the testator that the legatee shall not take one without the other, he must take all or none (*Talbot* v. *Lord Radnor*, 3 My. & K. 252; *Guthrie* v. *Walrond*, 22 Ch. D. 573).

It will be noticed that in all the cases which have been mentioned of compensation for the amelioration of one man's property by another individual, the amelioration is invariably due to something done upon the property ameliorated. In no civilized country does the law recognize that a person who for his own purposes executes works upon his own property, and thereby incidentally improves his neighbour's adjacent property, has any claim against the neighbour for compensation in respect of such improvement, or for recoupment of any part of the expenses by means of which it has been effected. In all cases of the application of the maxim *Qui sentit commodum sentire debet et onus*, the *commodum* has been voluntarily assumed with a knowledge at the time that the *onus* existed, and that it would have to be assumed also.

But the recent proposals with regard to betterment contemplate that a public body who in executing their own works for their own purposes incidentally improve adjacent property, shall have the right to impose part of the expense of the works on the owner of that property without leaving him an option in the matter; so that a person who receives a *commodum* not only without his consent, but also without the possibility of declining it, shall be bound to assume a corresponding *onus* with it. If these proposals are sound in law, their soundness certainly cannot be supported by any recognized law of betterment or amelioration as between private individuals. They are to be justified, if at all, either on their own legal merits, whether with or without previous legal precedent, or on the analogy of the counter-principle which we have already considered of compensation for the 'worsement' of property by public works.

No precedent to guide us in the matter is to be found in Roman law. But the justice and equity of the principle have been affirmed by many statutes of various State Legislatures in the United States of America, and by numerous decisions in cases which have come before the American Courts. To cite only one of these cases, the legal aspect of the principle was fully considered in the Supreme Court of Massachusetts in the year 1866 under the exceptional opportunities for the discussion of abstract questions of law which exist in the United States, where, under the Constitution, the Supreme Court of each State has power to pronounce an Act of the Legislature of that State unconstitutional and illegal, and the Supreme Court of the United States can in like manner declare an Act of Congress to be a violation of the Constitution and therefore void. The case of *Dorgan* v. *City of Boston* (12 Allen's Rep. Supr. Court of Mass. 223) arose upon a Statute of the Massachusetts Legislature (St. 1865, c. 159), which authorized the Corporation of the City of Boston to widen a certain street in the city. The Corporation were to pay to the owners of land taken for the purposes of the improvement compensation according to the value of the land before the improvement was effected, and the whole expense of the improvement, including the compensation so to be paid for the land taken, was to be assessed upon all the estates abutting on the widened street in proportion to their value after the improvement had been made. But it was also provided by section 10 of the Statute that any owner of an abutting estate might elect to surrender the whole of his estate to the city, and in that case the city were to purchase it from him and were to be at liberty to resell the portion not actually required for the execution of the improvement. The plaintiff, Edward Dorgan,

who was an owner of abutting property, filed a bill in equity to restrain the City of Boston from exercising the powers of their Statute in reference to his property. He alleged that the portion of his estate which would be left to him after the street had been widened would be almost valueless, but that the defendant Corporation were nevertheless proceeding to assess a large sum upon him in respect of it, and that the Statute under which they claimed to do so was unconstitutional and void. In the present disquisition we are not concerned with the objections which he advanced to the validity of the Statute on the ground of the mode in which it provided for the determination and payment of compensation for property actually taken by the City. But he further objected that the assessment provided by the Statute as the means by which the expenses of the improvement were to be defrayed was a violation of the State Constitution. It was admitted that similar betterment laws had been passed and sustained as valid in the Courts of law in other States; but it was urged that their validity had been upheld on the express ground that there was nothing in the constitutions of those States which restricted the power of their legislatures over taxation. The Constitution of Massachusetts, on the other hand, had expressly empowered the State Legislature to impose only proportional and reasonable taxes. The Court, however, in its judgment on the case held that this provision of the Constitution referred only to taxation for defraying the public and general charges of government. Where money was expended in effecting an improvement of a local character, which, although it might enure, to a certain extent, to the benefit of the public, was nevertheless especially necessary for, and beneficial to, private property in its immediate vicinity, it would not be equitable or just, nor would it tend to the equalization of public burdens, that the cost of the improvement should be laid on the whole people. The Court saw no reason for construing the provision as an inhibition on the levy of a tax for local purposes of a public nature upon those who would reap the benefit on their estates of the proposed expenditure of money. The judgment of the Court proceeds to cite several instances, dating from 1658 onwards, in which a like mode of assessment of taxes for similar objects had been resorted to and carried into effect, without doubt or question, in the commonwealth of Massachusetts, both under the colonial government and since the adoption of the constitution. It was apparent that the Statute objected to by the plaintiff could not be regarded as an innovation. On the contrary, it seemed to be entirely in accordance with the established course of legislation from the foundation of the government. But there was further to

be taken into consideration the provision in section 10 of the Statut·, requiring the City to purchase the whole of the estate of an abutting owner, who should elect to surrender it to them in its entirety rather than retain a portion saddled with the improvement tax. Construing that section with the previous provisions of the Statute, the Court thought that the State Legislature had in substance required the City to take the whole estates abutting on the proposed improvement, in case it should be necessary for the completion of the work and the more easy adjustment of the damages. In the event of all the owners of the abutting estates electing to surrender them, the entire cost of the work would fall upon the City; and if, after the construction of the new street, those portions of the estates which were not absorbed in the street, produced, when sold, less than the whole cost of the work, the deficiency when sold would be a public charge, to be defrayed by general taxation. It was clear, therefore, that the Legislature considered the work to be of such a public nature and such general convenience as to warrant them in authorizing, in a certain contingency, the taking of the whole of the abutting estates for the purpose of carrying it out. In the language of the judgment, the effect of the Statute was to condemn all these estates 'as being subject to sequestration under the right of eminent domain for a public use.' But inasmuch as it might not be actually necessary that the whole of every estate should be taken, the owners were allowed the privilege of retaining the portions not required on condition that those portions should be subject to assessment for the cost of the work, rateably in proportion to their respective values after the completion of the improvement. The right given to an abutting owner by section 10 of the Statute was in effect nothing more than a mode of signifying that he did not wish to exercise the privilege of reclaiming any part of his estate after the completion of the work on the terms prescribed by the Statute, but that the whole might be appropriated to the use of the city, and disposed of by the city accordingly. In that view, the assessment in question could not be regarded as imposed on the plaintiff against his will, but must be deemed one which he had voluntarily assumed in order to save a portion of his estate from being appropriated under the right of eminent domain to a public use. That being so, the Court held that he stood in such relations to the defendant City as to render the maxim *Volenti non fit injuria* an answer to the bill, and that the bill must accordingly be dismissed as showing no claim to equitable relief.

The instances of the application of the principle which have occurred in our country up to the present time have not travelled

beyond the limits of justice and equity laid down in the Massachusetts judgment, which has just been quoted. As mentioned at the outset, the first incorporation of the principle into our statute law took place as early as 1666. In that year the Act 18 & 19 Charles II. c. 8, for the rebuilding of London after the great fire, empowered the Corporation of the City to enlarge certain streets, and then enacted that the owners of houses which were rebuilt on sites adjoining the enlargements, in consideration of the consequent improvement and melioration of their property, should pay such sum to the Corporation as should be mutually agreed upon or as in default of agreement should be awarded by a jury.

This, however, was an exceptional enactment occasioned by a wholly exceptional catastrophe. Coming down to more recent times we can trace in the legislation of the present reign the gradual adoption of the principle and its development into the position which it now holds. We find an instance of it, in its earliest stage, in the Public Health Act of 1875 (38 & 39 Vict. c. 55, ss. 23, 36, 41, 213, 215, 232). Under that statute sanitary authorities are empowered to require the owners or occupiers of houses within their district, which are not sufficiently provided with drains and sanitary accommodation, to supply the deficiency at their own cost. If they fail to do this, the sanitary authority may themselves execute the necessary works and may declare the costs incurred by them in so doing to be 'private improvement expenses.' It is then enacted that whenever these private improvement expenses are incurred, the authority may, if they think fit, impose a private improvement rate on the property in respect of which they have been incurred, of such an amount as will discharge the amount of the expenses with interest at a limited rate in a period of not exceeding thirty years, with power for any owner or occupier of the property to redeem the rate on payment of a corresponding capital sum. In these provisions it will be observed that the application of the principle of betterment is confined to charging with the exact expense of amelioration the premises actually ameliorated by an outlay made upon them. Four years later, however, the principle was carried a step further so as to embrace property increased in value by works executed upon other property of the same owner. For by the Artisans Dwelling Act of 1879 any owner of unfit dwellings who had been required by a local authority to alter or demolish them, might make a counter requisition on the local authority to purchase the premises from him. In that case the amount of the purchase-money was, in default of agreement, to be settled by arbitration, and it was provided that the arbitrator in assessing the amount should have regard to and make an allowance

in respect of any increased value accruing in his opinion to other property of the same owner from the alteration or demolition of the purchased premises which the local authority intended to carry out (42 & 43 Vict. c. 64. ss. 5–7). After an interval of three years the principle was again extended, and was, by the Artisans Dwellings Amendment Act of 1882, applied to cases where the ameliorated property and the property dealt with by the public body belonged to different owners. That statute authorized local authorities to order the demolition of buildings which obstructed other premises by stopping ventilation or otherwise, and then proceeded to enact that where, in the opinion of the appointed arbitrator, the demolition of an obstructive building added to the value of the previously obstructed premises, he should apportion among those premises so much of the compensation to be paid for the demolition of the obstructive building as should be equal to their increase in value. The amount so apportioned to each of the premises was to be deemed private improvement expenses incurred by the local authority in respect of the premises, within the meaning of the Public Health Act, 1875; and the local authority might levy improvement rates within the meaning of that Act on the occupiers of the ameliorated premises for the purpose of defraying those expenses. Disputes between any such occupier and the arbitrator as to the amount to be so apportioned were to be settled by two justices in the manner provided by the Lands Clauses Act, 1845 (45 & 46 Vict. c. 54. s. 8). The above-mentioned provisions of the Acts of 1879 and 1882 were repealed and re-enacted by the Housing of the Working Classes Act, 1890 (53 & 54 Vict. c. 70. ss. 38 (8), 41 (2) (b)).

All these applications of the principle of betterment are unquestionably just and equitable, and it will be noticed that they are all covered by the analogy of the converse case of the injuriously affecting of property as provided for by the Lands Clauses Act. The same cannot be said of the further extension of the principle attempted but not as yet effected by the London County Council in connexion with their scheme for widening and improving the Strand. Their Bill on the subject was introduced into Parliament in the Session of 1890. The 28th clause of this Bill, which became popularly known as the 'betterment clause,' began by reciting that the improvement would be effected at the expense of the London ratepayers, but would or might increase in value lands and property fronting on or in the neighbourhood of the improvement, and it was reasonable that such increased value should be reserved wholly or in part for the ratepayers by whose expenditure it had been produced. The clause then proposed that a Standing Arbitrator should be appointed by the Home Secretary on the application of the London County

Council, and that a rentcharge to be called the Strand Improvement Rentcharge should be created of such a total amount as when capitalized would not, in the opinion of the arbitrator, exceed one-half of the cost of the improvement. Within three years after the completion of the improvement the County Council were to frame a provisional award describing the premises which in their opinion would be increased in value by or in consequence of the improvement, and stating the amount of increased value resulting in their opinion to the several premises, the proportion of the Strand Improvement Rentcharge which would be apportioned on the respective premises, and the owners lessees and occupiers by whom the rentcharge would be payable. The premises to be assessed were all to be included within the area defined by the Bill—an area of tolerably wide limits around the site of the improvement. Power was proposed to be given to any owner or lessee or occupier of premises affected by the provisional award to object to the award on the ground that the premises ought to be excluded from it, or that premises omitted from the award ought to be inserted in it, or that the award was incorrect in some point of fact or in the amount of increased value attributed to the premises, or that the increased value was not due to the improvement, or that the rentcharge in respect of the premises ought to be paid by some other person or persons than the award prescribed. The validity of the objection was then to be determined by the Standing Arbitrator. The clause contained other ancillary provisions, but those which have been cited above indicate the principles and method proposed to be adopted in giving effect to the principle of betterment in reference to the intended widening of the Strand. The Bill, as already mentioned, has not yet become law, and the above-cited provisions of its 28th clause assuredly ought never to be placed upon our statute book. There is, of course, no objection to recognizing the fact that as property may be injuriously affected by a diminution of the facilities for access to it, so it may be improved by an increase of those facilities through the widening of an adjacent thoroughfare. There is no objection to imposing upon the owners of property so improved a rate representing the increment in value which has actually accrued; though there is much to be said in favour of the equity of allowing to the owners in such cases the option of requiring the public authority to purchase the property from them at its unincremented value. But the unjust and inequitable feature of the proposal of the London County Council was the assumption that within an arbitrarily defined area in proximity to, though not actually abutting on, the site of the improvement, property would be thereby increased in value to an aggregate

amount equivalent to one moiety of the total cost of the improvement, so that an aggregate improvement rate, which, if capitalized, would represent that moiety, might fairly be imposed upon the lands and buildings or some of the lands and buildings within the specified area. For observe the particular form of the proposal. The increase in the value of a particular property within the area in question was not to be taken as a measure of the actual amount of rate which the property was to bear. That would have been equitable enough. But it was only to be taken as a measure of the proportionate part which the property was to bear, relatively to other properties, of an aggregate rate of an arbitrary and unchallengeable amount. The persons interested in any property proposed to be charged with this improvement rate were to be permitted to call in question the proportionate amount to which their particular property was to be liable in respect of the whole rate, either on the ground that the property ought not to be subjected to the rate at all, or on the ground that its proportion of the rate ought to be diminished by the liability to the rate being extended to some other properties not proposed to be rated, or by a reduction of the amount at which the property was set down as having been increased in value by the improvement. The liberty to show that other properties, though included in liability to the rate, were insufficiently rated, having regard to the actual extent to which they were improved, would appear to have been omitted from some oversight, since it is on all fours with the grounds of objection actually conceded to the persons who were destined to bear the rate. But they were designedly not to be permitted to call in question the total amount of the aggregate improvement rate. The idea of the London County Council was in fact the same as if Parliament, when it authorized the construction of a railway, instead of allowing each owner of adjacent properties which were injuriously affected by the construction to prove the extent of the damage sustained by his property and to recover that amount from the railway company, were to fix in the first instance the aggregate amount to be paid by the company to the owners of all adjacent properties injuriously affected, and were only to leave it to the several owners to prove as between themselves the relative extent to which their respective properties were injured, with a view to settling what proportionate amount of the available fund each owner was entitled to receive. The injustice of such an arrangement is apparent on the face of it; independently of the endless cost and trouble which it would entail upon each owner in proving that the amount of injury inflicted on other properties was over-estimated, as well as that the effect on his own was insufficiently estimated.

No less intrinsically unjust is the scheme of the London County Council, and no less oppressive would be the labour and expense which it would impose on the landowners concerned, in showing not only that the estimate of the improvement of their own property was exaggerated, but also that the improvement of other properties was under-estimated. It is also to be observed that a single arbitrator, appointed *ad hoc* by a strong political partisan, as the Home Secretary might not improbably be, at the request of the London County Council, would be a very unsatisfactory tribunal for assessing the amount of the rate to be borne by the persons upon whom it was sought to be imposed.

Our review of the whole subject has, I think, established the conclusion which I suggested at the outset of the inquiry—namely, that betterment, or the liability of property improved by public works to contribute in respect of that improvement to the cost of the works, is a sound legal principle, but that the extent and manner of its recognition and application ought to be very strictly defined. In accordance with this conclusion we shall approve as just and equitable the enactments of 1666, 1875, 1879 and 1882, to which reference has been made. We shall also approve the introduction of the principle into the Strand Improvement Scheme of the London County Council. If property is injuriously affected by diminishing the modes of access to it, there can be no question that it is ameliorated by an improvement in those modes of access. But we shall not approve the method in which the London County Council have proposed to carry out the principle. We shall insist that in its application the following conditions should be recognized and observed:—

1. Just as compensation cannot be obtained by aggrieved parties in all cases of damage caused by the execution of public works, so a betterment tax cannot be imposed on all parties who happen to derive some special benefit from the works. The principle ought only to be applied where property is by the operation clearly increased in value intrinsically, and not merely in reference to any particular use to which it may from time to time be put.

2. Just as, in the case of worsement or the injuriously affecting of property, the owner is allowed by the Lands Clauses Act, 1845 to select whether the tribunal to determine the compensation shall be arbitrators or a jury; so, and much more, in reference to betterment, the party who is to be taxed ought to be permitted to select the tribunal by whom the tax upon him shall be assessed. A recognition of the right of the party who is to be taxed to be satisfied as to the competency and impartiality of the tribunal is essential to the equitable working out of the principle.

3. If the owners of the ameliorated properties are offered no alternative but to submit to the betterment tax, each case ought to be investigated and decided on its own merits; and the tax on each property ought not to be of a greater amount than, when capitalized, will represent the actual increase in value of the property caused by the execution of the works.

4. The assessment of any betterment tax on properties actually or conjecturally improved by the execution of public works otherwise than in accordance with the three conditions just laid down can only be justified, if, as an alternative to bearing the tax, the owners are given the option of requiring the body which is executing the works to purchase the properties at the values at which they stood previously to the commencement of the works. It would be more strictly just and equitable that this option should be given in all cases, even where the tax proposed to be levied strictly represents the actual amount by which the property is increased in value.

5. The betterment tax, whether it is imposed in the form of a perpetual or of a terminable rentcharge, ought to be capable of being redeemed by any person interested in the property, either before it is begun to be levied, or at any time afterwards during its continuance.

PHILIP VERNON SMITH.

BREACH OF PROMISE OF MARRIAGE.

IN the following pages it is not my intention to expatiate on the details of a department of law so fully settled as this, but rather to trace how this action originated both in England and Scotland, to indicate the position in which it stands at present, and to suggest on what broad principles practical reforms may be made.

In the very remarkable extension of actions on the case, and especially of assumpsit, by which so much was brought within the cognizance of the common law, it was held as early as the reign of Charles the First that 'if *A* in consideration that *B* promised him to take him to be her husband, promises to take *B* to be his wife *infra breve tempus* after, and after *A* marries another woman, *B* may have an action upon the case against *A* upon this promise, for this is a good consideration[1].' Considerable objection, however, was taken on the ground that the consideration was a purely spiritual one and that the matter was not cognizable by common law, and a writ of error was brought, but the judgment was confirmed by the Court of King's Bench. In 1651 a similar decision was given in *Baker* v. *Smith*[2], and nineteen years later the same principle was acted upon in *Mills* v. *Middleton*[3], but the most exhaustive discussion seems to have taken place in 1672 when the case of *Mary Holcroft* v. *Dickenson*[4] came before the Court of Common Pleas. The allegation of the plaintiff was that the defendant by the breach of his promise had 'hindered her preferment to her damage of 100 pounds.' Each of the three judges who formed the court considered the relative jurisdictions of the courts of common law and the ecclesiastical courts at great length, and finally (Chief Justice Vaughan dissenting) decided that this action was maintainable at common law.

In 1698 the action passed into a further stage of development in *Harrison* v. *Cage et uxor*[5], in which a man brought a similar action against a lady who had pledged her vows to him and afterwards gone and married another, that fortunate man being joined as defendant for reasons sufficiently obvious before the days of Married Women's Property Acts. It does not appear that any technical objection was taken at the trial, and a prosaic but

[1] *Stretch* v. *Parker*, Mich. 12 Car. Rot. 21; Ro. Abr. 22.
[2] Style 295. [3] Keble 866. [4] Cart. 233.
[5] Carthew 467; 5 Mod. 411; 1 Salk. 24.

sympathetic jury found 'a verdict for the plaintiff and £400 damages, the woman being worth £3000 when the plaintiff courted her, and after the death of her brother worth double that sum' (!) and Chief Baron Ward gave judgment accordingly. After an unsuccessful application for a new trial on the ground of excessive damages, a motion was brought in the King's Bench in arrest of judgment, on the ground that no action lay. In support of the motion it was argued that 'it is not reasonable that a young woman should be caught into a promise' and voidability from uncertainty as to time was suggested, but the points most relied upon appear to have been that there was no case in which the writ *causa matrimoniae praelocuti* had been held good against a woman, and that, as in the eye of the law a man was not advanced by marriage, the woman's promise was of no value in law, and thus the contract must fail for lack of consideration. But the judges held otherwise. Rokeby J. pointed out that a man had an action for slander *per quod matrimonium amisit*, which was hardly consistent with the defendant's ungallant contention as to woman's worth; and Holt C.J. and Turton J. took the simple ground that the promises were mutual, so that if an action lay on the one promise it would lie on the other also. The reasoning of the Chief Justice, however, is not quite so clear when he goes on to say, 'In the ecclesiastical court he [the plaintiff] might have compelled a performance of this promise; but here indeed she has disabled herself, for she has married another,' for the canon law decreed such specific performance only where the words had amounted to *matrimonium per verbis de praesenti*, which, by the canon law, of itself constituted a marriage, all that was enforced being the additional formality of solemnization in face of the Church. In such case, even if in the meantime one of the parties had actually solemnized a marriage with some one else, the ecclesiastical courts (at the time of their full power) would have treated the latter as void and would have enforced the formalities of the original contract[1]. If, however, that original contract had not amounted to *matrimonium per verbis de praesenti* they would not have proceeded beyond an admonition. Perhaps by this time the activity of the ecclesiastical courts had diminished. Perhaps, even apart from any decree of specific performance, the fact that such a substantial thing as an ecclesiastical admonition then was lay behind it, might be sufficient, even at common law, to redeem the promise from the forlorn condition of a *nudum pactum*.

In 1704[2] Chief Justice Holt further ruled that this action would

[1] As in *Bunting* v. *Lepingwell*, 4 Co. 355. Phillimore's Ecclesiastical Law, *passim*.
[2] *Hutton* v. *Mansell*, 6 Mod. 172.

lie even without the proof of an express reciprocal promise by the plaintiff—in this case a lady—so long as it could fairly be implied from the circumstances. Fifteen years later, in *Holt* v. *Ward Clarencieux*[1] an action was brought by an infant and a verdict was given for £2000 damages. The plea of infancy was raised on demurrer in the Court of King's Bench, and in support of it the rules of the canon law on this point were clearly set out. Lord Chief Justice Raymond, however, who pronounced the judgment of the Court, held that as this action was maintainable at common law, it must be measured by common law rules, and that, consequently, such a contract was voidable by the infant, but binding on the person of full age. The rules of the canon law, so far as they bore on this matter, had now at last been quietly laid at rest, and have never since been disturbed. The action was dependent on the rules of the common law alone, and in 1729 in *Cork* v. *Baker*[2] the important decision was arrived at that the words of the fourth section of the Statute of Frauds, which required signed writing to maintain an action on 'any agreement made upon consideration of marriage,' did not apply to this class of bargains. Had it been otherwise, how different would the course of litigation have proved.

The more modern series of cases seem to begin with *Atchinson* v. *Baker*[3], in which a gentlemen, who, owing to the deterioration of his health, had lost the affections of the lady who was pledged to him, by the same cause suffered the additional disappointment of defeat in the action which he subsequently brought. *Foulkes* v. *Sellway*[4] in 1800 and *Potter* v. *Deboos*[5] in 1815 were early modern cases with fair plaintiffs, and as time went on their actions grew more numerous and their victories more magnificent, though it must be admitted that they never in this country reached that phenomenal state which they apparently attained in the United States[6]. The excessive laxity which characterized them at length received somewhat of a check by the Evidence Amendment Act of 1869, which required that the plaintiff's evidence should be corroborated. *Bessela* v. *Stern*[7] showed how slight a corroboration would be sufficient for the purpose—the evidence of an eavesdropper, who had heard (!) the defendant remain silent when charged by the plaintiff with the promise, fulfilling the requirements—but *Wiedemann* v. *Walpole*[8] showed that the provisions were by no means illusory.

[1] 2 Str. 937. [2] 1 Str. 34. [3] Peake Add. Ca. 103 [1796].
[4] 3 Esp. 235. [5] 1 Stark 82.
[6] American cases cited by Willes J. in *Smith* v. *Woodfine*, 1 C. B. N. S. 660 *passim*.
[7] L. R. 2 C. P. D. 265. [8] '91, 2 Q. B. 534.

In Scotland the modern style of action appeared a few years earlier than the decision of *Harrison* v. *Cage et uxor*. Marriage was (as it still is) based upon the system of *matrimonium per verbis de praesenti* without any further solemnity being required, and might be of the most informal character—'irregular marriages' being then the rule rather than the exception. Yet Scots law, following the doctrine of the old civil law, laid down that until the marriage (however informal) actually took place, there was always a *locus poenitentiae*—a right freely to change one's mind—subject only to this, that the party who 'resiled' without fault on the other side, should make good to that other party any expense, such as special attire, which had been incurred with a view to the marriage—following in this, too, the civil law as to the *arrhae sponsalitae*. But in 1685 Graham's case[1] came before the Lords of Session, and we read that 'though they found *matrimonia debent esse libera*, and that there is a *locus poenitentiae*; yet under that pretence one ought not to be damnified, therefore they admitted her expense to probation; and she having proved that she was put to £80 Scots (about £7) of charges *eo nomine*, the Lords at the advising for that expense *and for her loss of market* modified £100 Scots (about £9) against him, in regard especially that he could give no rational ground why he gave over the bargain. This decision,' adds Fountainhall the reporter, 'seems equitable, though it be new.'

But even with the new equitable principle as to measure of damages, proof of some actual loss appears to have been necessary to maintain the action. The next case seems to have occurred in 1715[2] when a man sued under a written contract to marry with a penalty of £100 Scots 'adjected' thereto (!), but failed on the ground that no actual loss was proved, and in 1770[3] a fair plaintiff, bringing an action under more normal conditions, was also unsuccessful for the same reason. Technical proof of some trifling loss is, however, easily obtained, and this ineffective rule seems gradually to have become obsolete. By 1812[4] the Court of Session had accepted the new principle so thoroughly as to allow a verdict for £500 damages to stand, and four years later[5] confirmed another for £900. The 'equitable' exceptions had in fact swallowed the old rule, and the subsequent cases simply elaborate the new principle.

At about the same time and from the same equitable jurisdiction there appeared a twin action to this—the direct action for seduction. Till near the close of the seventeenth century

[1] M. 8472. [2] Young M. 8473. [3] Johnston M. 13916.
[4] Hogg, May 27, F. C. [5] Rose, July 19, 1816, F. C.

such an action appears to have been quite unknown, but in 1696 *Hislop* v. *Ker*[1]—a case of seduction under 'false and flattering insinuations'—came before the Lords, and they 'declared that they would allow damages against the man who had *dolose* induced a party to trust him,' and referred the damages to be assessed. The report is scanty, but it appears that the defendant had acted in bad faith throughout, and probably the merits of the case to some extent obscured the principle which the decision involved. That was to be more fully canvassed fifty years later in *Linning* v. *Hamilton*[2]. In that case, after various preliminaries, the lady had been awarded £200 damages for seduction, and the defender now appealed to the Lords to have the verdict set aside on the ground that no action lay, the pursuer contrariwise appealing for an increase of damages. It does not appear that there had been any promise of marriage—certainly no deliberate one—but the pursuer's character was apparently high. The principle of *ex turpi causa* was pressed upon the Court, and it had special force at a time when this kind of immorality was (by the 13th Act of the Reformation Parliament) a criminal offence. Against this, however, stood the actual merits of the case, the principle of actions *dolose*, and—with a force which we hardly appreciate now—the precedent of the Mosaic law which ordained that in the circumstances the man ought *stupratam aut nubere aut dotare*—to 'marry or tocher' her as the old Scots version ran. The Lords refused both petitions without answers, thereby 'adhering' to the judgment, and supporting the principle on which it was based. 'The Lords,' says Fountainhall, who reports the case most fully, 'were far from being unanimous. Those who were for damages founded their opinion upon discouraging vice, and no doubt the judgment in this case will put men more on their guard than formerly. But then it must have a bad effect on the female sex . . . Formerly,' adds the ungallant reporter, 'marriage was a woman's sole aim . . ., but now a woman has a wider field of action. Her first view is to engage the man's affections in order to entrap him into a marriage. If this fail, her second view after inflaming his desires is to yield to them, for which she is to be rewarded with a handsome portion.'

In 1785[3] the Lords again acted on the same rule, which henceforward may be considered as settled law, and the Legislature in making 'actions for damages on account of breach of promise of marriage, or on account of seduction' triable by jury[4], appears to have recognized the principle of this action, and to have confirmed

[1] M. 13908. [2] M. 13909. [3] *Buchanan* v. *McNab*, M. 13918.
[4] Court of Session Act 1825.

the practice of giving the jury a free hand in the assessment of damages.

Thus by processes widely dissimilar did breach of promise practice in England and Scotland come to much the same thing, the principal differences being that the provisions of the Evidence Amendment Act do not apply to Scotland, and that there, should the plaintiff fail on that action, she may nevertheless succeed on the supplementary one[1]. In practice the two are often brought together[2].

In England, on the other hand, the only action for seduction that exists is based on the right to the service of the seduced—real or fictitious—and is only maintainable by those who have been deprived of it. When once the action gets to a jury they have an unfettered discretion, and they are in fact frequently directed to take wounded feelings into account. But seldom does such an action get that length. On principle it is only competent when both the seduction and the resulting state which unfits for service happen in the same 'service,' in practice it is only brought by parents or guardians, and in fact the common law at this point is notoriously so riddled with exceptions and technicalities as to afford no protection worthy of the name.

By the law of France—with due regard to *la liberté illimitée qui doit exister dans les mariages*—the breach of a promise to marry does not give a right of action for damages, save only in so far as *préjudice* has thereby been caused to the other party, an exception based apparently on tort rather than on contract[3]. Such *préjudice*, however, is not limited to the narrow special damage of the civil law and the former law of Scotland[4]; it may be *moral* as well as *matériel*[5], and, in case of seduction, may even include consequent damage[6]. Damages, however, are only allowed in respect of such *préjudice* as is reasonably capable of commercial assessment, and no regard is paid to injured feelings or hypothetical loss—*ils sont réglés seulement à raison de la perte qu'elle éprouve*[7].

In Italy, on the other hand, the strictness of the earlier law still obtains, no action being maintainable *ex contractu* on the promise itself[8], and the damages recoverable (apparently *ex delicto*) being limited to the money loss directly sustained—*delle spese fatte per causa del promesso matrimonio*[9].

The evils which seem inseparable from our breach of promise

[1] *Gray* v. *Brown* [1878] 5 R. 971. [2] *Paton* v. *Brodie* [1858] 20 D. 258.
[3] Pollock on Contracts, 5th ed. p. 316.
[4] Sirey & Gilbert's Code Civil, Art. 1142, notes 11 & 15.
[5] Ib. note 13. [6] Ib. note 14. [7] Ib. notes 16 & 18.
[8] Codice Civile Italiano, Art. 53. [9] Ib. Art. 54.

litigation are notorious. In *Hall* v. *Wright*[1] a defendant tried unsuccessfully to plead the failure of his health as an excuse for the failure of his promise. But later litigants have always found it far more effective to direct their disparagements against the other party. The tactics are only too well known. The action affords an unrivalled vantage-ground for demolishing the character of a lost lover, and is consequently unequalled for black-mailing claims and for discreditable defences. Mr. Justice Mathew's cynical remark to a jury last year in one of the most mercenary of modern cases—a case, however, in which the defendant was eventually mulcted of several hundred pounds—that 'love is not a necessary element in a breach of promise case,' is true in more senses than the one in which it was uttered.

The irresponsible generosity of juries too, when, as in such cases, the measure of damages is quite arbitrary, is not only frequently very unjust, but generally, so far as it proceeds on any principle at all, seems to proceed directly at variance with the only intelligible one, namely, that seduction and actual out-of-pocket expenses apart, damages should be assessed upon what the Lords of Session somewhat coarsely called 'loss of market.' How different the practice! If the girl be pretty, the jury generally give her heavy damages; if she be unattractive, they often have a sneaking sympathy with the man. She who has her fortune still before her is handsomely recompensed, while her plainer sister, who could ill afford to lose the best years of her life, is often sent empty away. In fact the same girl would probably stand a better chance after a short engagement than at a later date when, after a long one, her charms had somewhat faded.

The question of a sweeping reform to a great extent depends upon whether damages should be obtainable for seduction, as in fact they often indirectly are in these cases. As usual, the accepted maxims do not help us very much. *In pari delicto potior est conditio defendentis* may be true as a rule of law and excellent as a principle of legislation, but though both parties may be *in delicto* they are seldom in anything like *pari delicto*. *Ex turpi causa non oritur actio*, but the 'turpitude' of a wronged girl is often of the most technical. Still, hard as it might prove in exceptional cases, such a system of damages should not be allowed.

In practice, as between the parties, the action affords opportunity for the exercise of vindictiveness rather than for the satisfaction of wrong, and, as regards the public, notoriety is given to a class of evidence and a species of relationships which should never obtain the sanction of the law. In all probability, too, the system goes

[1] E. B. & E. 746.

a long way to discourage honourable and disinterested attentions on the one hand, and to promote the completion of ill-assorted unions on the other. As for 'loss of market'—if *matrimonia debent esse libera* be the true principle of law (and I submit that it is), and if, as Lord Mansfield has said[1], 'it would be most mischievous to compel parties to marry who can never live happily together'—that equity is far outweighed by the others, and there should be, and there should be recognized to be, a 'place for repentance' up to the very moment when the knot is tied.

In 1878 the present Lord Chancellor (then Mr. Herschell) brought in a short Bill to abolish Breach of Promise Actions altogether, and that Bill reappeared in 1883 and 1884, and again in 1888 and 1890, Mr. Bryce, Mr. Caine, and Sir Roper Lethbridge being amongst those who backed it. But on no occasion did it attain to a second reading.

A resolution, however, in favour of abolishing the action 'except in cases where actual pecuniary loss has been incurred by reason of the promise, the damages being limited to such pecuniary loss,' was introduced by Lord (then Mr.) Herschell, and carried in the House of Commons by 106 votes to 65 on May 6, 1879[2], and there are floating rumours of a Bill on these lines for next Session promoted by the same high authority. Such a change would apply the ordinary rule as to measure of damages to this class of actions, would tend to exclude all evidence save that of the promise, the breach of it, and the consequent money loss, and would in practice reduce these causes to the financial level of the County Courts. Involving as it would the abolition of what often really amounts to indirect damages for seduction[3], and of all personal considerations of a mercenary character, such a rule might press hardly in some few cases, but the general effect of it would be wholesome. It would, to a very large extent, mean the clearing away of judicial extensions of jurisdiction, and of inexpedient equities, and the restoring of the broad principles of an older and more universal law.

J. DUNDAS WHITE.

[1] Quoted in *Atchinson* v. *Baker, supra.*

[2] Hansard, vol. ccxlv, pp. 1867-87.

[3] The proposal to make seduction under promise of marriage a misdemeanour seems more in harmony with the spirit of the law as to personal morality. But that is not yet.

IS A RIGHT OF ACTION IN TORT A CHOSE IN ACTION?

THE above question is raised in Sir Howard Elphinstone's late interesting article, intituled 'What is a *chose in action*[1]?' and the learned writer appears to be of opinion that it should be answered in the negative. For he takes objection, towards the end of his article, to the definition of a chose in action in such terms as to include rights against a tortfeasor; notwithstanding that such a definition is given both in Termes de la Ley and Blount's Law Dictionary. It is difficult, Sir Howard Elphinstone says, to see how rights against a tortfeasor can be regarded as property. It is difficult to class a mere expectation of damages among property, and if it is not property it is not a chose in action. Then he argues that rights against a wrongdoer are to be distinguished from rights under a contract, because the latter were indirectly assignable by power of attorney, while an assignment of rights against a tortfeasor was absolutely void, not only at law, but in equity, on the ground of champerty. And he concludes by stating that the phrase *chose in action* is never at the present day used in the meaning of a right of action in respect of a tort. There are, however, certain considerations, upon which Sir Howard Elphinstone did not touch, and which appear to me to make in favour of an affirmative answer to the question raised. What these are, I hope to be now permitted to state; and I shall endeavour to show that there is good reason and respectable authority, besides that of Termes de la Ley and Blount's Law Dictionary, for not limiting the term *chose in action*, even at the present day, so as to exclude a right of action in tort.

First, I think it will appear, on tracing the source of the term *chose in action*, that it is an elliptical expression for a thing lying in action. And a thing lying in action may, I think, be explained as a thing which it requires an action to recover or realize, if wrongfully withheld. And to recover or realize a thing would seem to mean to bring it into physical fruition, or to make it so ripe therefor that nothing is lacking to fruition of the thing but to take possession of it. The earliest allusion I have found to the distinction between things in possession and those in action[2] is

[1] L. Q. R. ix. 311 (Oct. 1893).

[2] There is no mention in Glanville, Bracton, Britton, or Fleta of any classification of things as being in possession or in action: but in the three last-mentioned works the difference is well marked between corporeal things in their owner's possession

in 22 Ass. pl. 37 [1], where it was said that the lord may seize what is in possession of a villein, as rent granted to him, of which he is seised, but the lord shall not have what remains in action to the villein (*ceo que demurt en action al villein*), as if obligation of debt or covenant or warranty be made to him. Coke, when citing the same case, remarks [2], 'But that which lieth in action, as a warranty made to the villein his heirs and assigns, the lord shall not take advantage of by voucher; because it is in lieu of an action. Neither shall the lord take advantage of any obligation or covenant or other thing in action made to the villein; because they lie in privity and cannot be transferred to others.' The term 'thing in action' is not often employed by Coke: but there are other references in his Commentary on Littleton to chattels or things, which consist, or lie or are in action [3]; and these seem to me to establish the identity of a thing in action with a thing lying in action.

There are also passages of Littleton and Coke which show that, in speaking of a *thing* in action, reference is especially made to the fruits of the action, to the thing recoverable by means of the action, and that damages (a word which, according to Coke [4], hath in the common law a special signification for the recompense that is given by a jury for a wrong) are properly included among such things. These passages are to be found in Litt. s. 503, and Co. Litt. 288 b, and they relate to the cases in which a release of all personal actions may be well pleaded in bar of a writ of error. Coke points out a diversity, when by the writ of error the plaintiff shall recover or be restored to any personal thing, as debt, damage, or the like;

and *mere rights* (of action or otherwise); Bract. fo. 10 b, 61, 407 b; Fleta, fo. 125, 126; Britt. liv. 1, ch. 29, s. 2, and liv. 2, ch. 2, ss. 1, 10. We learn from Bracton, too, that what may be termed things lying merely in action could not be bequeathed by will in his day. He points out (fo. 61, 407 b) that if debts due to a testator be not recovered by judgment or acknowledgment in his lifetime, the actions to recover them will pass to his heir: but debts so recovered are part of the testator's property and will go to his executors. And Littleton and Coke afterwards teach us (Litt. s. 504; Co. Litt. 289 a) that debts recovered by judgment are not things lying *merely* in action, for they can be reduced into possession without action, i.e. by levying execution. In Fleta (fo. 183) *actio* is mentioned amongst the things, which *nullo dari debent.*

[1] Abridged, Bro. Abr. Chose in Action, 8.

[2] Co. Litt. 117 a.

[3] See Co. Litt. 292 b, that rent reserved on letting land for a year 'is a thing not merely in action,' and that an annuity 'is not merely in action,' in each case, 'because it may be granted over.' See Co. Litt. 351 as to a husband's rights in his wife's 'chattels reals consisting merely in action,' 'chattels reals being of a mixed nature, viz. partly in possession and partly in action,' chattels real which 'were merely in action before the marriage,' and 'chattels personal, which be in action.' On comparing 10 Rep. 48 a with 3 Rep. 2 b, it appears that, when Coke speaks of a 'right to land in action,' he means 'a right, which consists only in action, *where the entry is tolled.*' Such a right ('for which the party hath no remedy but by action only to recover the land') is said to be 'a *thing* which consists only in privity, and which cannot escheat, nor be forfeited by the common law.'

[4] Co. Litt. 257 a.

for then the release of all actions personal is a good plea, for that the plaintiff is to recover or be restored to something in the personalty. And afterwards[1] he bids us note that an action real or personal doth imply a recovery of something in the realty or personalty or a restitution to the same. According to Coke, therefore, damage, or recompense for a wrong, is a thing recoverable by action in the personalty. It appears to follow that it is a personal thing in action. Brooke too, whose use of the term *chose in action* in his Abridgment shows that it was an established law term before Coke's day[2], appears to admit the right to bring an action of trespass to be a chose in action, though an uncertain one, not assignable even by the king[3].

The definition of a chose in action given in Termes de la Ley plainly includes a right of action in tort. Sir Howard Elphinstone however traverses this part of the anonymous author's explanation of the term upon the authority of Blackstone. Now Blackstone, instead of being contented to explain the distinction made by his predecessors between what is in possession and what lies in action, endeavoured to expand the difference so taken into an exhaustive classification of *property* in chattels personal. 'Property in chattels personal,' he says[4], 'may be either in *possession*; which is where a man hath not only the right to enjoy, but hath the actual enjoyment of the thing; or else it is in *action*; where a man hath only a bare right, without any occupation or enjoyment.' Later on, after admitting the right to recompense for a breach of contract, giving rise to a claim for unliquidated damages, to be a chose in action, he lays down that all property in action depends entirely upon contracts[5]. In making these statements Blackstone does not appear to be following any previous authority. These statements, however, seem to have prompted Sir Howard Elphinstone's argument above quoted, which we will now consider in detail.

As we have seen, Sir Howard Elphinstone says that it is difficult to class a mere expectation of damages among property, and if it is not property it is not a chose in action. But to this it may be objected, first, that the term *chose in action* was an established law term long before the word *property* came to be used in the wide sense of valuable things, in which it appears to be here employed[6]; so that it can hardly be accurate to require a right of action in tort to be included in property as a condition precedent to its being classed among things in action. And secondly, that rights of action for injuries to property have been expressly held to be

[1] Co. Litt. 289 a.
[2] Brooke died in 1558; Foss, Judges, v. 360.
[3] Bro. Abr. Chose in Action, 11, abridging Y. B. 5 Edw. IV. 8, pl. 22.
[4] 2 Black. Comm. 389.
[5] 2 Black. Comm. 397.
[6] See below, p. 146, n. 2.

included in the personal estate of the injured party, and to pass under the words 'personal estate' to his assignees in bankruptcy by virtue of the Bankruptcy Act of 1825[1]. And personal *estate* (in the wide sense of the word) appears to be exactly equivalent to personal property[2]. It will not, moreover, be disputed that under the present Bankruptcy Act, as under the Act of 1869, a bankrupt's rights of action for injuries to property pass to the trustee in bankruptcy. But there are no words in either statute to effect this, save the provision that the bankrupt's *property* (which expression is declared to include things in action[3]) shall vest in the trustee[4]. A man's rights of action for injuries to his property must therefore be necessarily included in his property, notwithstanding that the amount of the recompense to which he is entitled remains uncertain till a verdict be obtained. So that, even if we adopt Sir Howard Elphinstone's own test of a chose in action, rights of action for injuries to property appear to fulfil its requirements.

With respect to rights of action for injuries to the person or reputation, it is of course settled that they are so personal to the injured party that they are not included in the property which passes to his trustee in bankruptcy[5]. But it is submitted that such rights may nevertheless be aptly described as things in action, because the recompense for *any* wrong is a thing lying in action; and, as Blackstone himself is forced to admit[6], the right to compensation for a wrong arises immediately the injury is committed,

[1] See Stat. 6 Geo. IV, c. 16, s. 63; *Beckham* v. *Drake* (1849), 2 H. L. C. 579, at pp. 625, 626, per Parke B. 'The words "personal estate" clearly comprise all chattels, chattel interests, and all the subjects mentioned in the 12th section' (of Stat. 6 Geo. IV, c. 16); 'and they also comprise some rights of action which are not properly debts, and would not pass under the word "debts," but do pass under the description of "personal estate." For instance, some actions for tort do pass. Actions for injuries to personal chattels, whereby they are directly affected, and are prevented from coming to the hands of the assignee, or come diminished in value, undoubtedly pass. The action of trover for a conversion before the bankruptcy is a familiar instance of this.'

[2] See *Kirwan* v. *Johnson* (1651), Style 293; *Countess of Bridgewater* v. *Duke of Bolton* (Hil. 2 Anne), 6 Mod. 106; *Scott* v. *Albury* (Pasch. 6 Geo. I), Comyns, 337, 340; *Hogan* v. *Jackson* (1775), Cowp. 299, 306, 307; *Doe* d. *Wall* v. *Langlands* (1811), 14 East. 370, 12 R. R. 553; *Doe* d. *Morgan* v. *Morgan* (1827), 6 B. & C. 512; a succession of cases showing how, first, the word *estate*, and afterwards the word *property*, acquired in law the meaning of everything valuable which a man has. Brooke, who in his Abridgment uses *chose in action* as a well-known term, employs the word *propertie* in the sense of ownership only, in which sense it is used in the Year Books. See Bro. Abr. Propertie; Y. B. 6 Hen. VII. 7, pl. 4. Down to Coke's time and after, the proper legal description of everything a man had was all his lands, tenements and hereditaments, goods and chattels; and real and personal estate hardly became established law terms before the reign of Charles II; see the authorities cited in Williams, Real Property, pp. 25–28, 17th ed.

[3] See Stats. 46 & 47 Vict. c. 52, ss. 20, 44, 50 (5), 54, 57 (2), 168; 32 & 33 Vict. c. 71, ss. 4, 15, 17, 22.

[4] See *Seear* v. *Lawson*, (1880) 15 Ch. D. 426; *Guy* v. *Churchill*, (1888) 40 Ch. D. 481, 487.

[5] *Ex parte Vine, Re Wilson*, (1878) 8 Ch. D. 364.

[6] 2 Black. Comm. 438.

although the amount of the damages is not ascertained before verdict. Indeed, Blackstone ranks damages for a wrong under the head of '*property* acquired by suit and judgment at law[1].' Surely a thing which is acquired by suit must be a thing lying in action; and as Blackstone shows, the judgment (which ends the action[2]) neither confers the title to the damages, nor ascertains their amount. What good reason is there then for discarding the authority of Brooke, Coke, and Termes de la Ley in favour of Blackstone's peculiar limitation of the term *chose in action*? And does not Blackstone's own explanation show that recompense for a wrong is a thing in action? Whether the recompense for any injury to the person is a thing in action assignable before judgment is another question, which, as will appear from the note at the end of this article, has been decided in the United States in the negative.

The distinction which Sir Howard Elphinstone makes between rights of action *ex contractu* and those *ex delicto*, on the ground that the former were indirectly assignable, while the latter were not, raises the interesting question, how far a right of action in tort is assignable at the present day. The authority cited by the learned writer for his statement that an assignment of rights against a tort-feasor 'was' (I notice that he does not say 'is') absolutely void at law is Y. B. 34 Hen. VI. 30, pl. 15. In this case Littleton, for the plaintiff, argued that no duty to another could be granted over, no more in the case of a duty arising from contract than, if one did trespass to him, he could assign the money which he might recover for the trespass; and Wangford, for the defendant, maintained that the duty of a thing which is certain could be well assigned, but conceded that a duty of a thing which is not certain, as in the case of trespass, could not be assigned. It is to be remarked that at this early period the right to assign a chose in action in contract was anything but firmly established; indeed the very case cited was an action brought against the assignee of a debt for maintaining the assignor in his suit against the debtor. Nor is champerty mentioned in the arguments quoted as the reason why the money to be recovered as damages for trespass should not be assignable. So that upon the whole the authority cited does not throw much light upon the possibility of assigning a right of action in tort in modern times, when it became settled that a chose in action might well be assigned by power to sue in the assignor's name. There is no doubt, however, that the test propounded by Wangford of the certainty or uncertainty of the thing has been adopted to a certain

[1] 2 Black. Comm. 438.

[2] Co. Litt. 289 a.

extent. Thus, as we have seen[1], even the king could not assign a right of action for a trespass done to him, on account of the uncertainty of the thing. So the *chattels* forfeited to the Crown upon outlawry or conviction of felony comprehended all rights of action upon contract, though for unliquidated damages, upon the ground that in such actions the measure of damages is certain[2]; also, it seems, all causes of action for deprivation of, or injury to, the outlaw's or felon's goods, where the measure of damages is the value or the diminution of the value of the goods[3]: but not a right of action for damages wholly uncertain, as in trespass *qu. cl. fr.*[4] We may note here that the authorities cited upon the law of forfeiture seem to countenance the proposition, that rights of action for injury to goods, where the measure of damages is certain, are things in action forming part of the personal estate or property which was forfeited upon outlawry or conviction of felony; so that the law of forfeiture, as well as the law of bankruptcy, affords material for maintaining that, at least, rights of actions for injuries to property are things in action. But to return to the point, the solution of the present question appears to depend upon the following principles:—(1) Any agreement to maintain another person's action in consideration of receiving part of the land, debt, or other thing in suit, is void for champerty. (2) At the same time 'the assignment *pendente lite* of the subject of a suit is not champerty or in any way illegal, even though the assignor gives the assign a power of attorney to sue in his name, and agrees that he will not impede, but will assist the assign[5]. (3) A mere right of suit in equity, not coupled with or incidental to an interest in property, as a mere right of suit to set aside a release obtained by fraud, is not assignable[6]. (4) The policy of the bankruptcy law is to make everything, which vests in a trustee in bankruptcy, saleable by him; every right of action, in tort or otherwise, which vests in a trustee, is therefore assignable over by him, even though it might not have been assignable by the bankrupt himself[7]. It may be added that the law of champerty remains unaffected by anything in the Judicature Acts[8]. I do not propose to examine in detail the

[1] *Ante*, p. 145.
[2] *Batty* v. *Fay* (1795), Ridgeway, Lapp & Schoales, 511.
[3] Co. Litt. 128 b; 3 Leon. 205, pl. 261; Hawk. P. C. bk. ii. ch. 49, s. 9; *Bullock* v. *Dodds* (1819), 2 B. & A. 258, 276.
[4] *Fleming* v. *Smith* (1861), 12 Ir. Com. Law Rep. 404.
[5] See per Kay J., *James* v. *Kerr* (1889), 40 Ch. D. 449, 456, 457, for authority for both the above propositions.
[6] *Prosser* v. *Edmonds* (1835), 1 Y. & C. Ex. 481; *De Hoghton* v. *Money* (1866), L. R., 2 Ch. 164, 169; *Hill* v. *Boyle* (1867), L. R., 4 Eq. 260.
[7] *Seear* v. *Lawson* (1880), 15 Ch. D. 426; *Guy* v. *Churchill* (1888), 40 Ch. D. 481.
[8] See *Ball* v. *Warwick* (1881), 50 L. J., C. P. D. 382; *James* v. *Kerr* (1889), 40 Ch. D. 449; *Guy* v. *Churchill* (1888), 40 Ch. D. 481, 485.

authorities for these propositions, but the following cases appear to throw some light on the object of our inquiry. In *Simpson* v. *Lamb* (1857), 7 E. & B. 84, the plaintiff, in consideration of £50 paid to him by his attorney in the action, assigned to the attorney, before judgment in the action, the benefit of a verdict for £50 damages given in his favour (whether in contract or tort appears not). This assignment was held void, because no attorney is permitted to purchase anything in litigation, of which he has the management, *whatever might have been the case had the purchase been by a stranger*. In *Anderson* v. *Radcliffe* (1858), E. B. & E. 806, the plaintiff in ejectment, after a verdict in his favour but before judgment, gave his attorney a bill of sale by way of mortgage for £100 on a crop of potatoes growing on the land. This was held valid, a distinction being taken between an absolute conveyance of the matter in suit to the attorney in the action, and an assignment of the same by way of security. In *Cohen* v. *Mitchell* (1890), 25 Q. B. D. 262, an undischarged bankrupt was carrying on business on his own account. In the course of such business, he became possessed of some goods, which were wrongfully taken away from him. He sued the taker for wrongful conversion of the goods, but finding that he had no money to carry on the action, he assigned the cause of action to Cohen in consideration of the money then due to him, and further sums necessary to carry on the action. The action resulted in a verdict for £120 against the taker of the goods. Before the money was paid, the trustee in the bankruptcy of the undischarged bankrupt intervened and claimed the amount of the verdict from the taker; who interpleaded, paying the money into Court. And the issue was tried, whether Cohen or the trustee was entitled to the money, and was found both by Mathew J. and the Court of Appeal for Cohen, on the ground that the intervention of the trustee was too late. But although the trustee fought the case to the Court of Appeal, it does not appear that any suggestion was made on his behalf that the assignment to Cohen of the cause of action (which was of course in tort) was void for champerty or on any other ground; nor did it occur to any of the learned judges [1], who decided the case on appeal, to question the validity of the assignment. On the contrary, the very ground of their decision was that the bankrupt had made a valid assignment of his cause of action, and this was exactly what barred the trustee's intervention. It appears from this last case therefore that a right of action sounding in damages for wrongfully withholding goods (where the measure of damages is, as a rule, the value of the goods) may be

[1] Lord Esher M.R., Fry and Lopes L.JJ.

lawfully assigned over. If so, between such rights of action and rights of action *ex contractu*, the distinction alleged by Sir Howard Elphinstone does not seem to obtain. It is a possible inference from the cases of *Simpson* v. *Lamb* and *Anderson* v. *Rudcliffe* that the recompense due for any wrong may well be assigned over (except to the plaintiff's solicitor absolutely) as soon as the damages are ascertained by verdict; from which time until judgment, it may be remarked, the thing still remains merely in action[1]. But it is questionable whether the plaintiff in an action for injury to the person can have anything assignable before judgment: while it is arguable that a right of action for any injury to property ought to be assignable before verdict[2]. In truth, it appears to remain an undecided question, to what extent the modern principles of the assignability of a chose in action and of the subject of a suit are applicable to an action at law to recover damages for a wrong. And notwithstanding the sweeping remarks of Lord Abinger in his judgment in *Prosser* v. *Edmonds*, 1 Y. & C. Ex. 481, 497, 499[3], I think that it should not be assumed without argument that this question must necessarily be answered altogether in the negative. The inference to be drawn from the case of *Cohen* v. *Mitchell* is against a negative answer in the case of actions for wrongfully taking or withholding goods, where the measure of damages is the value of the goods. Take further the case of actions for spoiling goods, where the measure of damages is the diminution in value of the goods. Do the principles stated above prohibit the assignment, upon the sale of damaged goods, of the right to recover compensation for the injury which they have sustained? Nay, may it not be inferred from the settled principles of the law of insurance that there is nothing obnoxious to public policy in such an assignment of a mere right of action? The insurer of a house, a ship, or other goods, who has paid on a total or partial loss, is subrogated to all

[1] Co. Litt. 289 a. It should be noted, however, that in modern practice, the recompense for a tort is not only reduced to certainty, but also to a certain extent placed in security by verdict; as if either party die after verdict but before judgment, judgment may nevertheless be entered up, although the cause of action do not survive; Stat. 17 Car. II. c. 8, s. 1; *Palmer* v. *Cohen* (1831), 2 B. & Ad. 966; *Kramer* v. *Waymark* (1866), L.R., 1 Ex. 241; Rules of the Supreme Court, 1883, Order XVII. r. 1. But there is no debt due to the plaintiff from the defendant in an action of tort until judgment is signed, even though the damages may have been ascertained by verdict; *Ex parte Clarke* (1811), 14 East 197. Nor are damages ascertained by verdict provable in the defendant's bankruptcy, unless judgment be signed before he be adjudged bankrupt; *Re Newman, Ex parte Brooke* (1876), 3 Ch. D. 494.

[2] See the American cases cited in the note at the end of this article.

[3] 'It is a rule not of our law alone, but of that of all countries, that the mere right of purchase shall not give a man a right to legal remedies. . . . Robert Todd, when he assigned, was in possession of nothing but a mere naked right. He could obtain nothing without filing a bill. No case can be found which decides that such a right can be the subject of assignment, either at law or in equity.'

other rights of compensation which the insured may have. He is therefore entitled in equity to maintain in the name of the insured any action for damages which the latter may have against any other person for injuring the thing insured. Thus if a ship insured against collision at sea be run down by the fault of another owner's vessel, underwriters, who have paid for the loss, are entitled to maintain in the name of the insured all the latter's remedies to recover damages for the collision [1]. What is this but the assignment, by the effect of a mere contract, of a right of action in tort [2]? And if it were to be held that rights of action so assignable by subrogation may not be assigned directly, would not that lead to the following absurd result, namely, that a man might lawfully contract to compensate another for a future wrong on the terms that he should succeed on payment to the other's rights of action against the wrongdoer, but he might not lawfully agree to compensate the other for a past wrong on the same terms?

There are of course strong arguments against holding that the right of action is assignable in the case of injuries to the person or reputation, for which the damages are altogether uncertain, are not to be measured by any standard of loss or diminution in value of property, and include compensation for bodily harm or annoyance, and which create an obligation so personal to the parties united thereby that it remains unaffected by the bankruptcy, and is destroyed by the death of either, and is not transferable on the outlawry of the injured party.

I have considered the present question quite apart from the provisions of the Judicature Act of 1873, which render a 'debt or other legal chose in action' directly assignable [3], because it does not appear that those provisions contain anything to affect the law of maintenance or champerty, or any other rule of public policy against the assignment of a right of action in tort [4]. It could not, I think, be maintained that the Act in question makes valid the direct assignment of any chose in action, of which the indirect assignment was previously prohibited by law. But it may well be contended that, if in any case a right of action in tort be assignable at all, it will then be directly assignable as a legal chose in action by virtue of the enactment referred to.

[1] See *Randal* v. *Cockran* (1748), 1 Ves. Sen. 98; *Mason* v. *Sainsbury* (1782), 3 Doug. 61, 64; *Yates* v. *Whyte* (1838), 4 Bing. N.C. 272, 283, 284; *Simpson* v. *Thomson* (1877), 3 App. Cas. 279, 284–6, 290, 291, 293, 295; *Castellain* v. *Preston* (1883), 11 Q.B.D. 380, 388, 403, 404.

[2] Per Lord Blackburn, 3 App. Cas. 293: 'It is the personal right of action of the shipowner, the benefit of which is transferred to the underwriters.'

[3] Stat. 36 & 37 Vict. c. 66, s. 25, sub-s. 6.

[4] See *ante*, p. 148.

Lastly, with regard to Sir Howard Elphinstone's statement that the phrase (chose in action) is never at the present day used in the meaning of a right of action in respect of a tort. In the argument for the plaintiff in error in the case of *Rogers* v. *Spence* (1846), 12 Cl. & Fin. 700, at p. 705, the right to bring trespass *qu. cl. fr.* was spoken of as 'a chose in action,' and 'a chose in action in tort[1].' And in *Re Park Gate Waggon Works Co.* (1881), 17 Ch. D. 234, the right of any liquidator, creditor, or contributory of a company being wound up to proceed against any director of the company for a misfeasance[2] was expressly held by the Court of Appeal to be a thing in action of the company. It is submitted upon these authorities that modern practice has not departed from the ancient usage of the term *chose in action* as explained in Termes de la Ley; but that the phrase in question may still be well applied to a right of action in tort.

I may perhaps be permitted to add something with regard to Sir Howard Elphinstone's statement that *chose in action* in its widest sense would appear to include a specific chattel which is out of its owner's possession, though the term is not now commonly used with such a meaning. The only authority for applying the term *chose in action* to a chattel bailed by or taken from its owner appears to be Y. B. 9 Hen. VI. 6, pl. 64, in which case Paston J. seems to have suggested that if the owner of a box of deeds bailed it to another, and the other delivered it over to a sub-bailee, the box would be in action to the first bailee. Brooke's abridgment of this case (Chose in Action, 13) led Lord Justice Fry to state (30 Ch. D. 288) that in 9 Hen. VI. the property in deeds in the hands of a third person was considered as a *chose in action.* On reference to the Year Book, however, it appears that Paston's *dictum* does not warrant this statement, and that he clearly recognized that if the *owner* of chattels bailed them, he would retain the property in them. It is true that at one time a man deprived of his goods by a trespasser was considered to retain a mere right of action against the trespasser personally; but at that time the former was held to lose all right to the goods[3], so they cannot then have been *his* things in action. It is submitted that in modern law, at all events, the owner of a corporeal chattel, which is in another person's possession either through bailment or wrongful taking, has not a mere *chose in action*; the thing is not merely in action to him. It has always been admitted that a bailor retains

[1] There are also several instances of the application of the term *chose in action* to a right of action in tort in the American cases cited in the note at the end of this article; see especially *The People* v. *Tioga C. P.*, 19 Wend. 73, 75.

[2] Stat. 25 & 26 Vict. c. 89, s. 165.

[3] See 27 Ass. pl. 64; Y. B. 2 Hen. IV. 12, pl. 51; Finch, L. Bk. iii. ch. 6.

the property in the chattels bailed[1]; and it also came to be allowed that, where goods were taken by a trespasser, the owner retained the right of property in them, which right he might assert by retaking the goods, wherever found[2]. Also, according to Littleton[3], if I have a cause of action in detinue against another, and I release to him all personal actions, I may nevertheless retake my goods from him, because no right of the goods is released to him. Could this be so if the thing were merely in action to the releasor? Again in *Sir T. Palmer's case*, 5 Rep. 24 b, Sir T. P., seised in fee of a great wood, sold to *C* and his assigns 600 cords of wood, to be taken by the assignment of Sir T. P.; and it was held that *C* had an interest which he might assign over, and not a thing in action, or a possibility only; for it was resolved that if Sir T. P. did not assign them to *C* on request, *C* might take them without assignment. By the common law, too, a husband became absolutely entitled to his wife's personal things in possession on marriage, but for her choses in action they must as a rule have jointly sued[4]. Now if the goods of a single woman were wrongfully distrained or taken from her or bailed by her, and she afterwards married, her husband alone could sue in replevin or detinue, or release her right to the goods[5]. In *Franklin* v. *Neate* (1844), 13 M. & W. 481, moreover, it was contended that the owner of a pawned chattel had but a *chose in action*: but the contrary was decided. It is further submitted that the term *chose in action* points to the personal duty to be exacted by action (see Termes de la Ley, *sub verb.*), and is therefore improperly applied to such a right as the ownership (without possession) of a chattel, which right, although a bare right, is realizable by taking the thing, wherever found. Even debt and damages recovered by judgment, though not realized by execution, are not things lying merely in action[6]. Sir Howard Elphinstone states generally that bailed chattels cannot be seized under a *fi. fa.* issuing under a judgment against the owner. But it seems that the sheriff may seize and sell chattels bailed, of which the owner is entitled to resume possession at will, in execution of a judgment against the owner: though it is otherwise of chattels pawned or

[1] See Glanv. x. 13; Bract. fo. 151 a; Y. B. 48 Edw. III. 20, pl. 8; 2 Edw. IV. 5, pl. 9, per Needham J.

[2] See Y. B. 19 Hen. VI. 65, pl. 5, per Markham; 32 Hen. VI. 1, pl. 3; 6 Hen. VII. 7, pl. 4; Litt. s. 497; *Chapman* v. *Thumblethorp*, Cro. Eliz. 329.

[3] Sect. 498.

[4] Co. Litt. 351 b.

[5] Fitz. Abr. Replevin, 43; Moore 25, pl. 85; Bac. Abr. Detinue (A). The husband and wife must have joined in suing in trespass or trover for taking or converting the wife's goods before the marriage, because in these actions the plaintiffs disaffirmed the property in the goods, and sued for damages only; *Powis* v. *Marshall*, Sid. 172, 1 Keble 641.

[6] *Ante*, p. 143, n. 2; see also 1 Rop. Husband and Wife, 212.

hired or otherwise in the exclusive possession of the bailee[1]. There is, however, some analogy between chattels bailed and things in action with regard to their assignment[2].

T. CYPRIAN WILLIAMS.

NOTE.—The question of the validity of an assignment of a right of action in tort has received some consideration in the United States. It is laid down in Story's Equity Jurisprudence (§ 1040 g, vol. ii. p. 359, 13th ed. by Bigelow) that a mere right of action for a tort is not assignable; and his editors (*ib.* note b) merely draw the distinction that 'it seems otherwise of a right of action for goods converted, *where the tort is waived.*' But such of the American authorities as I have been able to examine do not throw a clear light upon the most important part of the question, namely, to what extent an assignment by power of attorney of a right of action in tort is valid. Thus the authority Story cites for his proposition is *Gardner* v. *Adams* (1834), 12 Wend. 297, in which a right of action in trover was held to be 'no more assignable than a right of action for any other tort—an action of trespass for instance, or an assault on the person.' But in that case the assignee was suing in his own name. And it was accordingly said by Cowen J., in *The People* v. *Tioga C. P.* (1837), 19 Wend. 73, 77, that '*Gardner* v. *Adams* merely declares that a tort is not assignable *so as to warrant an action in the name of the assignee.*' In *The People* v. *Tioga C. P.*, it was held that a right of action by a master for loss of his female servant's services by her seduction could not be so effectively assigned by power of attorney as to prevent the assignor from afterwards releasing the judgment to the tortfeasor, though the latter had notice of the assignment. The main ground of the judgment was that, as the action was for personal injury, and the right of action was so personal to the injured party as not to be transmissible on his bankruptcy or death, he could not transfer the duty created by the wrong. But the learned judge admitted a distinction between actions for personal injuries and actions for injuries to property; and he cited an earlier case of *North* v. *Turner* (1823), 9 Serj. & Rawle, 244, in which it was held that a right of action in trespass *de bonis asportatis* was assignable in equity. And as he suggested that the assignee's remedy was to sue the assignor for a breach of his implied agreement to do nothing to prevent the assignment from being effectual, he can hardly have considered that the contract of assignment was void for maintenance or champerty. In *Thurman* v. *Wells, Fargo & Co.* (1854), 18 Barb. 500, it was alleged that one Spencer delivered gold-dust and coin to the defendants as common carriers, and that they behaved so negligently that the goods were lost, and Spencer assigned the cause of action and his ownership

[1] Bro. Abr. Pledges, 28; *Duncan* v. *Garratt* (1824), 1 C. & P. 169; *Balls* v. *Thick* (1845), 9 Jur. 304; *Rogers* v. *Kenny* (1846), 9 Q. B. 592.
[2] See *Burn* v. *Carvalho*, 4 My. & Cr. 690.

of the goods to the plaintiff. And it was held that the plaintiff could not sue the defendants *in his own name* upon the cause of action so assigned under the New York Code; because that code does not make directly assignable any right of action, which was not indirectly assignable at common law, and the right of action being in tort was not assignable at common law. Brown J., speaking of the assignment of rights of action, said, 'I think this cannot be done in cases where the thing assigned consists of a mere right of action for an unliquidated unrecognized claim arising *ex delicto*, and of which there can be no possession and nothing resembling a possession, and no capability of enjoyment. If this class of claims are to be the subject of sale, assignment, and transfer, so as to enable the assignees to institute suits in their own name, and call the assigners as witnesses to make out the causes of action, then we have entered upon a new epoch in the history of civil jurisprudence.' In that case, however, the plaintiff sued in his own name, and it was sufficient to bar his action that he had no right so to sue either under the New York Code or at common law. The action assigned, moreover, was for the wrong, not of taking or damaging goods, but of negligence in the performance of a common carrier's duty. As to the learned judge's objection to the assignment of a cause of action and calling the assignor to sustain it, that appears to have reference to the common-law rule not admitting the evidence of the parties to an action. When this rule prevailed in England, it was held to be maintenance to assign a cause of action, even on contract, with the mere object of letting in the assignor's evidence; *Bell* v. *Smith*, 5 B. & C. 188, 194. But of course such an objection to the assignability of a right of action in tort loses its point when the law no longer rejects the evidence of the parties to an action. In *McKee* v. *Judd* (1855), 2 Kern. 623, a right of action in trover was held, by five judges against two, to be assignable; so that the assignee might sue in his own name under the New York Code. In *Rindge* v. *Inhabitants of Coleraine* (1858), 11 Gray 157, injury was done to a horse while in the possession of a hirer. He settled with the owner for the damage upon an agreement that he should sue the tortfeasor for his own profit in the owner's name. This agreement was held not to be tainted with champerty; chiefly, it appears, on the ground that the hirer of the horse had an interest in the claim for damages. In *Davis* v. *Herndon* (1860), 39 Miss. 484, it was held that a right of action in trover was not assignable so as to enable the assignee to sue in his own name. In *Rice* v. *Stone* (1861), 83 Mass. 566, a claim for damages for personal injury was held not to be assignable in equity before judgment, even after verdict; the Court basing its judgment to a great extent on a previous case of *Stone* v. *Boston & Maine Railroad* (1856), 7 Gray 539, in which it was held that a claim against a railroad corporation for injury to the person did not pass by an assignment of his estate under the Massachusetts insolvent laws before recovery of judgment, though a verdict had been found for the plaintiff before his insolvency. But as in *The People* v. *Tioga C. P.*, the Court in *Rice* v. *Stone*

admitted a distinction between actions for personal injuries and actions for injuries to property. The case of *North* v. *Turner*, *ubi sup.*, was mentioned without disapproval. Of *Gardner* v. *Adams*, *ubi sup.*, it was remarked, 'The question does not appear to have been much discussed, and the authority of the case is less valuable on that account. *The People* v. *Tioga C. P.* was argued by able counsel, and appears to have been thoroughly discussed.' But *Rice* v. *Stone* was followed in *Linton* v. *Hurley* (1870), 104 Mass. 353, in which case however it did not appear at what stage of the action the assignment was made. In *Grocers' Bank* v. *Clark* (1866), 48 Barb. 28, a right of action to recover damages for the fraudulent misapplication or conversion of property by an officer or agent of a banking association was held to be assignable, and *therefore* to have passed as *assets* under a statute vesting all the injured person's assets in the plaintiff. In *Hawk* v. *Thorn* (1869), 54 Barb. 164, the claim was that the defendants had wrongfully taken and sold a calf consigned to the plaintiff by its owner, and had received a certain sum being its value, and therefore a cause of action arose to the owner for the sum so received by the defendants, and the owner had assigned his claim to the plaintiff. It was held that the plaintiff might well sue, Cardozo J. saying, 'When a person has unlawfully taken possession of another's property, the tort may be waived and an action brought for its value. Such a cause of action is assignable.'

Two cases are cited in note (b) to Story, Eq. Jur. § 1040 g, 13th ed., to the reports of which I have been unable to obtain access—viz. *Dunklin* v. *Wilkins*, 5 Ala. 199, and *Dickinson* v. *Seaver*, 44 Mich. 624. Apart from these cases, however, it appears to me that the American authorities cited in the present note do not altogether bear out the proposition laid down by Story, but rather favour the conclusion that a man's right of action for injuries to his property are part of his property and therefore assignable in equity, while the obligation arising from an injury to the person or reputation is too personal to the parties affected thereby to be the subject of assignment. I cannot find that any attempt was made in any of the cases cited to argue by analogy to the assignment of a right of action in tort by subrogation under a contract of insurance: but such an argument obviously makes in favour of a similar conclusion. A perusal of the judgments in the American cases will show that there has been a tendency to take the rule of the devolution of rights of action on bankruptcy as a guide. It has at all events been considered that rights of action which do not devolve either upon a trustee in bankruptcy or an executor cannot be assignable: though in the case of *Grocers' Bank* v. *Clark* the argument was in a manner reversed, and it was held that a right of action for an injury to property was assignable, and therefore passed among the injured party's assets. In this country, however, the argument from analogy to the law of bankruptcy is open to the objection that it has been held in the above-cited case of *Seear* v. *Lawson* (*ante*, p. 148) that such rights of action as devolve upon

a trustee in bankruptcy are assignable by the policy of the statute law of bankruptcy, although they might not have been assignable by the bankrupt himself. But in my humble judgment a better test of the assignability of a right of action in tort may be found by referring to the doctrines of the common law. This is simply the rule propounded by Wangford so long ago as the 34th Hen. VI, that the duty of a thing which is certain may well be assigned over, coupled with the explanation afterwards adopted in determining the law of forfeiture on outlawry, that a right of action sounding in damages may be said to be certain when the measure of damages is certain. By the ancient common law, the king only could assign a chose in action directly, and he could generally assign whatsoever things were forfeited to him on outlawry or for felony; 17 Vin. Abr. 87, 88 (Prerogative M. b. 17). In the modern common law it was established that a common person might assign a chose in action indirectly by empowering the assignee to sue in his name. By the ancient common law, the limit of the king's power of assigning a chose in action was determined by the certainty or uncertainty of the thing (*ante*, pp. 145, 146), and for the purposes of this limitation it appears that damages are a certain thing when their measure is certain. Is there any good reason why the same test should not be applied to ascertain the limits of a common person's power of indirectly assigning a chose in action? Especially when the settled law as to the assignment of a right of action in tort by subrogation points to the same rule; subrogation being a consequence of a contract of indemnity, and indemnity being only possible against a pecuniary loss measured by injury to or loss of property. And by what authority are our Courts concluded from applying such a test?

T. C. W.

A CHAPTER IN THE HISTORY OF THE LAW OF LIBEL.

MOST writers accept the distinction so clearly drawn in English law between written and spoken scandal as a *real* difference, arising from the nature of things, and learned explanations are given of the necessity that existed 'from the earliest times' of regarding 'libel' as an injury of a 'greater and more aggravating nature than slander,' and therefore a cause of action in itself, independent of damage. As a matter of fact the distinction is entirely modern, accidental and insular. As late as 1812, Sir James Mansfield, Chief Justice of the Common Pleas, expressed strong doubts. Although compelled by weight of authority to decide in favour of the plaintiff in *Thorley* v. *Lord Kerry*[1], he said, 'The words if merely spoken would not be of themselves sufficient to support an action. But the question now is whether an action will lie for these words so written, notwithstanding that such an action would not lie for them if spoken: and I am very sorry it was not discussed in the Court of King's Bench, that we might have had the opinion of all the twelve judges on the point whether there be any distinction as to the right of action between written and parol scandal. . . . For the plaintiff in error it has been truly urged that in the old books and abridgments no distinction is taken between words written and spoken.' Insular the distinction also is, for it is not to be found in the Roman law nor in those great systems of law which on the continent and in Scotland are based on that law. The point is not altogether an academic one, for on this artificial distinction is based a large portion of the law of libel as it applies to newspapers, and although the hardship of the law as laid down in *Purcell* v. *Sowler*[2] has been somewhat mitigated by the Libel Acts of 1881 and 1888, there is still a feeling of grievance amongst those responsible for the conduct of our public newspapers at a distinction which, they say, discriminates unfairly against them. The burden of this grievance was expressed as follows in a paper read by the present writer at the last conference of the Institute of Journalists in Lincoln's Inn Hall.

'And here comes in our complaint against English law, not that it punishes defamation too severely, but that, in one great class of cases at least, it punishes the wrong man, and that man the journalist. If a speaker at a public meeting, speaking with the utmost deliberation, and with the knowledge that his words

[1] 4 Taunt. 355, 13 R. R. 626 (1812).

[2] 2 C. P. D. 215 (1877).

are being taken down for publication in the newspapers, makes by accident or by design an incorrect or an untruthful statement in dispraise of an opponent, and yet so frames his words that, in the absence of special damage he does not expose himself to an action for slander, that speaker goes free and unpunished. It may be right or it may be wrong—on that I express no opinion. But, mark the difference when the journalist comes on the scene. The words have been taken down and published. It is clearly not the business of the reporter or of the editor to sit in judgment on the speaker. They have neither the material nor the time for such an investigation. Their duty is to photograph the meeting, to pass it on to the public, for whom it was intended. Let the public judge between the speaker and his adversary, and if the accuser cannot justify his charges, let him suffer the consequences. But no, says the law, "These words in passing into print have become actionable; with the speaker, the author and publisher of the words we have nothing to do; it is for you, the journalist, to justify them by proving that they were of public concern, and that their publication was for the public benefit." . . . Two judges of the final Court of Appeal have recently laid it down as their opinion that a newspaper publishing a complete and accurate version of a judge's judgment, might find itself the defendant in an action for libel, "to which the supposed privilege in what was said by the judge would be no answer" (*Macdougall* v. *Knight*, 14 A. C. 194). And so we arrive at this extraordinary piece of topsy-turveydom. The statesman prepares his speech and the judge his judgment; each, let us hope, has carefully weighed his words before passing them on to the journalist, whose sole business and duty it is to present them to the public faithfully and accurately. Yet if the statesman or the judge has made a mistake, or committed a fault, he goes scot free, while the journalist has to pay the penalty.'

When I say that no system of law but the English recognizes this distinction, I do not of course mean that slander reduced to writing may not be regarded as a much more serious offence than oral slander, and consequently as one calling for a heavier punishment. It is, in fact, in all cases an aggravation of the offence; in no case is it an essential element on which to base a right of action. In the Roman law of the Twelve Tables [1] public affronts and accusations, whether oral or written, were punishable with death, and if under the later emperors, the law against the *libellus famosus*

[1] Our knowledge of the text of Table VIII which deals with this matter is very fragmentary, consisting chiefly of references to it in much later writers. Bruns, Fontes Juris Romani Antiqui (Tübingen 1871), has collected all the learning on the subject in his note on p. 20. Cicero, De Republ. 4. 10, professes to give the exact words—'si quis occentavisset sive carmen condidisset quod infamium faceret flagitiumve alteri.' The punishment is thus described by another writer, 'fustuarium supplicium constitutum erat in auctorem carminum infamium.' Bruns gives two fragments, 'qui fruges excantassit' and 'qui malum carmen incantassit,' which seems to suggest that the real offence punished by beating to death was incantation or witchcraft directed against a man's person, goods or crops, rather than mere defamation.

was still very severe, it must be remembered that this was a production in its nature and essence anonymous and scurrilous, bearing no resemblance to the early English pamphlets and news-sheets which the Star Chamber endeavoured, as we shall see, to suppress by a revival of the Roman law. Defamation as defined by Justinian (Digest xlvii. x. *De Injuriis et Famosis Libellis*, s. 5) was simply a variety of *injuria*, and might be either oral or written, and the modern French and German Codes faithfully follow their great original in this respect.

The French jurists have split up the offence into two grades—'diffamation' and 'injure.' The classical definitions of these are to be found in the law of May 17, 1819, which has remained unchanged. In section 13, 'Defamation' is defined as 'Toute allégation ou imputation d'un fait qui porte atteinte à l'honneur ou à la considération de la personne ou du corps auquel le fait est imputé;' whilst 'insult' is 'Toute expression outrageante, terme de mépris ou invective qui ne renferme l'imputation d'aucun fait.' These offences may be committed by any of the following means: 'Soit par des discours, des cris, ou menaces proférés dans les lieux ou les réunions publiques, soit par des écrits, des imprimés, des dessins, des gravures, des peintures, ou emblèmes vendus ou distribués, mis en vente ou exposés dans les lieux ou réunions publiques, soit par des placards et affiches exposés au regard du public.' There is certainly no trace in all this of any essential and fundamental distinction as to right of action between written and parol scandal. Nor will the German *Strafgesetzbuch* of 1876 help our English lawyers to discover some basis for the distinction. The classification is, as might be expected, a severely scientific one. Section 186, under the title 'Beleidigung,' defines the offence thus: 'Whoever asserts or circulates an allegation of fact (*Thatsache*) concerning another, which is calculated (*geeignet*) to make him contemptible or to lower him in public opinion, shall be guilty of defamation, unless he can prove the truth of his assertion (*wenn nicht diese Thatsache erweislich wahr ist*).' It is provided that the penalties shall be higher when the defamation takes place 'publicly or by the circulation of writings, pictures, or representations.' The following section defines the more serious offence of 'calumnious defamation' (*verläumderische Beleidigung*), which is committed when any one makes or circulates about another, with knowledge of its falsehood (*wider besseres Wissen*), an untrue assertion, calculated to make him contemptible, or to lower him in public opinion, or to injure his credit. The punishment is again higher in case of writing, but the cause of action is the same. In each case if the complainant has suffered in his property, his business, or his advancement (*Vermögensverhältnisse, Erwerb,*

Fortkommen) he can also, at the same trial, obtain from the defendant a money penalty. The law of Scotland also follows the Roman and makes the difference between 'scandal' and 'scandal reduced into writing and published or circulated,' simply one of degree.

Where, then, are we to look for the origin of this distinction in our English law, and how comes it, especially, that a nation which justly boasts of having been the first to proclaim the absolute freedom of the press from all censorship or previous restraint, should be the only one to invent a new and illogical distinction aimed solely against the press? The very interesting argument in *Thorley* v. *Lord Kerry*, already referred to, throws no light on the point. Mr. Barnewall for the plaintiff in error cites Rolle's Abridgement and Comyn's Digest as proving (and Chief Justice Mansfield agrees) that neither of these authorities recognizes the distinction, and that all the older cases treat writing and parol on the same footing, but he could not get over *King* v. *Lake*[1] and the long list of succeeding cases cited in opposition. Mr. King was a very litigious barrister of Charles the Second's time, who claimed that he was 'damnified in his good name and credit and profession' by Sir Edward Lake writing of a certain petition drawn up by him that it was 'stuffed with illegal assertions, ineptitudes and imperfections, and clogged with gross ignorances, absurdities, and solecisms.' Hale C.B. held that 'although such general words spoken once without writing or publishing them would not be actionable, yet here, they being writ and published, which contains more malice than if they had but been once spoken, they are actionable.' No attempt was made to cite any case earlier than this, but counsel claimed to have 'a chain of cases from Hale C.B. in 1670 to the time of Wilmott C.J. within living memory,' and Chief Justice Mansfield had reluctantly to admit that 'the distinction has been made between written and spoken slander as far back as Charles the Second's time,' but he concluded, 'if the matter were for the first time to be decided at this day, I should have no hesitation in saying that no action could be maintained for written scandal, which could not be maintained for the words if they had been spoken.'

But although the reports quoted do not go further back than the time of Charles II, the real origin of the English procedure against libels is to be found in the Star Chamber, abolished in the preceding reign. In Mr. Hudson's Treatise of the Court of Star Chamber, compiled apparently towards the end of the reign of James I, or early in that of Charles I, chapter xi is headed 'Of Libelling.' It would seem that this Court practically took over all cases of alleged

[1] Hardr. 470 (1670).

SOME RECENT DECISIONS CONCERNING 'ATTEMPT' AND 'INTENT.'

THERE is an excellent story told of a member of a learned Society, presided over by an eminent person of not wholly unexceptionable manners, who, when a fellow member began an address at one of its meetings with the customary 'Mr. Chairman and Gentlemen,' remarked, *sotto voce*, but nevertheless audibly, 'And a very proper distinction!' The English law draws an equally proper distinction between 'attempt' and 'intent'; and in these days, when the maxim *Voluntas reputabitur pro facto*—like certain other legal maxims which shall be nameless—if it ever had any real vitality, is well-nigh obsolete, if not as dead as Queen Anne, there is small reason for lawyers to confuse these terms, or to regard them as in any sense synonymous. But we are far from being sure that that august, albeit miscellaneous, tribunal known as C. C. R. has not, in its collective wisdom, succeeded, not only in confusing the terms, but—by a rather peculiar series of recently decided cases—in making confusion worse confounded, through a curious inconsistency of decision.

The question arises in connexion with so-called 'attempts' to commit impossible crimes. The subject appears to have been for the first time fully discussed by the Court for Crown Cases Reserved in *Reg.* v. *M'Pherson* (1857), 1 D. & B. 199. The prisoner in that case was indicted for breaking and entering a dwelling-house and stealing therein certain goods specified in the indictment which goods in fact were not in the house at the time, though there were other goods there. The prisoner was convicted of breaking and entering and *attempting* to steal. A case was reserved, and argued before a strong Court, consisting of Cockburn C. J., Coleridge, Crowder and Willes JJ., and Bramwell B., who quashed the conviction on the ground that there was no 'attempt' to commit the felony charged. In the course of the argument for the Crown (no counsel appeared for the prisoner) both Coleridge J. and Cockburn C. J. protested against the confusion of *attempt* with *intent*, pointing out that though the prisoner when he broke into the house had the *intention* to steal the goods specified in the indictment, they not being there he could not *attempt* to steal them. Cockburn C.J. put the case shortly thus: 'There can be no attempt *asportare* unless there is something *asportare*. There is a difference between

intending to do a thing and attempting to do it. A man goes to a place intending to commit a murder, but when he is there he does not find the man he expected to find. *How can he be said to have attempted to commit the murder? He merely attempts to carry an intention into effect.*' Bramwell B., to the like effect, after referring to the hypothetical case suggested in argument, that a man putting his hand into an empty pocket might be convicted of attempting to steal, as plausible at first sight, disposed of it effectually by asking whether a man, who, believing a block of wood to be a man who was his deadly enemy, struck it a blow intending to murder, could be convicted of attempting to murder the man he took it to be. Separate judgments were delivered all proceeding on the same lines, Cockburn C.J. laying it down that: 'The word "attempt" clearly conveys with it the idea, that if the attempt had succeeded the offence charged would have been committed; but attempting to commit a felony is clearly distinguishable from intending to commit it. An attempt must be to do that which, if successful, would amount to the felony charged; but here the attempt never could have succeeded.'

Seven years later the hypothetical case of an attempt to pick an empty pocket, which had been suggested during the argument of *Reg.* v. *M'Pherson*, actually arose, and came in a concrete form before the Court for Crown Cases Reserved in *Reg.* v. *Collins* (1864) (L. & C. 471; 9 Cox C. C. 497; 33 L. J. (M. C.) 177; 10 L. T., N.S. 581), when Baron Bramwell's *obiter dictum in arguendo* in the former case received confirmation by the formal decision of an equally strong Court, consisting of Cockburn C.J., Williams J., Martin B., Crompton J., and Bramwell B. Mr. Poland for the defence picturesquely, but none the less accurately, described the prisoner's putting his hand into the empty pocket as 'a mere voyage of discovery.' The prisoner, as the Court pointed out, had a double purpose, first to ascertain whether there was anything in the pocket; secondly, to take it if there was. He tried to steal something, but was foiled because there was nothing. Counsel for the Crown sought to distinguish the block of wood illustration, on the ground that to shoot at a log by mistake for a man was not an analogous case; for shooting at a log is not an overt act towards shooting a man; and he contended that the case in question was more like shooting at a man in chain armour. But Cockburn C.J. promptly disposed of this contention by pointing out that the case would have resembled shooting at a man in chain armour, if there had been a purse in the pocket, but tied or otherwise fastened there. As illustrative of the principle that 'intent' without 'attempt' is *nihil ad rem*, the Court suggested various hypothetical

cases; as a man walking into an open house with intent to steal and finding the house empty; or a man going with a pistol with intent to rob and murder another in a lane, to which the intended victim did not come; or a man taking an umbrella from a stand with intent to steal it, and afterwards finding that the umbrella was his own; in none of which cases a conviction could be obtained. The Court held the case to be governed by *Reg.* v. *M'Pherson*, and accordingly quashed the conviction.

The criminal law of attempt as thus laid down in (1857) *Reg.* v. *M'Pherson* and in (1864) *Reg.* v. *Collins* was recognized as settled law in 1879 by all the members of the Criminal Code Bill Commission of that year, consisting of Lord Blackburn, Mr. Justice Barry, Mr. Justice Lush, and Mr. Justice Stephen. The Commissioners in their Report upon the Draft Code [1] in proposing to alter the law said:—'Section 74, in this part, deals with attempts to commit offences, and treats the act of a person who, with the intention to carry off the money he believes to be there, puts his hand into a pocket, or breaks open a box, as an attempt to steal, though there was in fact no money in the pocket or box. This alters the law from what it has been held to be.' Accordingly, section 74 of the Code after defining an 'attempt' to commit a crime, in terms which substantially follow the language of the judgments in the cases above referred to, introduces the following clause (to which a note is appended, saying, 'This declares the law differently from *Reg.* v. *Collins*, L. & C. 471'):—

'Everyone, who, believing that a certain state of facts exists, does or omits an act the doing or omission of which would, if that state of facts existed, be an attempt to commit an offence, attempts to commit that offence, although its commission in the manner proposed was, by reason of the non-existence of that state of facts at the time of the act or omission, impossible [2].'

[1] Report of the Criminal Code Bill Commission 1879, C. 2345, at pp. 19, 77.

[2] Section 74 further provided that: 'The question whether an act done or omitted with intent to commit an offence is or is not only preparation for the commission of that offence, and too remote to constitute an attempt to commit it, is a question of law.' The exact point at which preliminary steps towards crime become criminal cannot, as Mr. Justice Stephen has pointed out, in the nature of things be precisely ascertained, nor is it desirable that such a matter should be made the subject of great precision. There is, as he remarks, more harm than good in telling people precisely how far they may go without risking punishment in the pursuit of an unlawful object. (General View of the Criminal Law of England, 2nd ed. (1890), p. 83.)

But it may be doubted whether the learned author be correct when he goes on to say (p. 84) that 'the bare formation of a criminal intention is not in itself criminal, *but this is the last step towards crime of which this can be affirmed.*' For in the illustration above quoted, the buying of the pistol and the going to the lane and the lying in wait for the victim would all be steps towards crime; but, it is conceived, not in themselves criminal, though they would come later than the formation of the criminal intention to kill, formed before the offender entered the shop to buy the pistol.

Neither the Draft Criminal Code of 1879 nor the more recent efforts at criminal law legislation have yet become law; and the new legislation, which the Draft Code of 1879 proposed for the alteration of the law as settled by *Reg.* v. *Collins*, has not been effected. The law therefore remained as laid down in that case; and Mr. Justice Stephen, accordingly in his History of the Criminal Law of England[1] published in 1883, namely twenty years later than that decision, thus expounds it:—

'The most curious point on this subject (i.e. attempts) is the question whether, if a man attempts to commit a crime in a manner in which success is physically impossible, as for instance if he shoots at a figure which he falsely supposes to be a man with intent to murder a man, or puts into a cup pounded sugar which he believes to be arsenic, or attempts to pick an empty pocket, he has committed an attempt to murder or to steal. By the existing law (*Collins's Case*, L. & C. 471) he has committed no offence at all, and this is also the law of France, and I believe of other countries[2], the theory being that in such cases the act done merely displays a criminal intention, but cannot be regarded as an attempt because the thing actually done was in no way connected with the purpose intended to be effected. It was proposed by the Criminal Code Commission to reverse this, I think with unnecessary severity. The moral guilt is no doubt as great in the one case as in the other, but there is no danger to the public, and it seems harsh to treat as an attempt one only of many acts by which a criminal intention is displayed; but the question is one of little practical importance.'

But the question has now, in consequence of certain recent decisions, unsettling well settled law, become one of considerable practical importance and interest. For six years after the learned author just quoted had thus expounded the existing law no wind of new doctrine arose to ruffle the smooth current of judicial decision. The first troubling of the waters took place when (1889) *Reg.* v. *Brown* (24 Q.B.D. 357; 59 L.J.M.C. 47; 61 L.T. 594; 38 W.R. 95) came before the Court for Crown Cases Reserved,

[1] Vol. ii. 225, and note (1). See also Stephen's Digest of the Criminal Law (Crimes and Punishments), 3rd ed. (1883), p. 37, Art. 49 (Illustration 9), 'An act done with intent to commit a crime, the commission of which in the manner proposed was, in fact, impossible, is not an attempt to commit that crime.'

[2] It is not a little singular that the learned author, who has a special acquaintance with our Indian legal system, should not have referred to the exception afforded by the provisions of the Indian Penal Code (XLV of 1860), chap. xxiii, sect. 511; which enacts that 'whoever attempts to commit an offence punishable by this Code . . . *and in such attempt does any act towards the commission of the offence* shall be punished' as therein provided. The legislative illustration, appended to section 511, is neither more nor less than the facts in *Reg.* v. *Collins*, but with a different result. '*A* makes an attempt to pick the pocket of *Z* by thrusting his hand into *Z*'s pocket. *A* fails in the attempt, in consequence of *Z*'s having nothing in his pocket. *A is guilty under this Section.*'

consisting of Coleridge C.J., Pollock B., Field, Manisty, Cave, Day, and Grantham JJ. The question was as to the validity of the conviction of the prisoner, a boy, for an attempt to commit an offence upon a fowl. The case was stated in consequence of a doubt which had arisen (owing to a supposed decision in an unreported case) whether a fowl was an 'animal' within the meaning of 24 & 25 Vict. c. 100, s. 61. The Court held that a fowl was within the statute; and, *it being found as a fact in the case that the offence in question could have been committed*, the conviction was accordingly affirmed. Having regard to this finding of fact any further deliverance by the Court with reference to the law as decided in *Reg.* v. *Collins* was clearly unnecessary and irrelevant. Nevertheless Coleridge C.J., by whom the case was stated, and who delivered the judgment of the Court, the rest of the Court merely concurring, proceeded to discuss and to over-rule *Reg.* v. *Collins*; notwithstanding that there had been no argument, no counsel appearing either for the Crown or for the prisoner. His Lordship, not forgetful of this fact, began by saying: 'It is no doubt a disadvantage that this case should not have been argued before us, but we have fully discussed the question ourselves.' Then, referring to *Reg.* v. *Collins*, he said: 'Now that is a decision with which we are not satisfied. It was in our opinion decided upon a mistaken view of the law[1].' That this utterance was mere *obiter dictum* is indeed practically admitted in the following sentence, in the same part of the judgment: 'We do not think, however, that upon the facts, this case comes within *Reg.* v. *Collins*, for there seems no doubt that this boy could have completed the offence.'

Having regard to the language of the judgment just quoted it is not a little surprising to find the Lord Chief Justice in delivering the judgment of the Court for Crown Cases Reserved, (Hawkins, Wills, Lawrance, and Wright JJ., concurring,) a year or two afterwards in *Reg.* v. *Duckworth* ('92, 2 Q. B. 83), saying, in commenting

[1] So reported in 59 L. J. (M. C.) 48, where the headnote refers to *Reg.* v. *Collins* as 'dissented from.' The report of the same case in 24 Q. B. D. 357 is to the same effect:—'That is a decision with which we are not satisfied . . . That case in our opinion is no longer law:' and the headnote treats the case as 'over-ruled.' So also does the headnote in 38 W. R. 96 where, in the report of the judgment, we have 'We do not think the decision in *Reg.* v. *Collins* should any longer be considered binding.' The report of the case in 61 L. T. 594, however, contains expressions differing *toto coelo* from these. The headnote refers to *Reg.* v. *Collins* as 'distinguished'; while in the judgment, as here reported, we read, 'Now that is a decision with which we all agree;' but, further on, the unreported case above referred to is mentioned as having 'proceeded on the authority of *Reg.* v. *Collins*, and so far as it proceeded on that authority, it was in our opinion decided upon a mistaken view of the law.' A legal contemporary commenting on these conflicting reports of *Reg.* v. *Brown* soon after their publication, afforded the following significant information respecting that decision: 'In point of fact, we believe the judgment was somewhat informal, and it was not very easy to catch what actually was said' (34 Sol. Jour. 653).

on a case which had been cited in argument—'There was, therefore, a serious question whether a man could attempt to discharge a firearm which in fact could not possibly be discharged (it being a blunderbuss discharged by means of a flint, and there being no flint in it). I do not say how that question would be decided at the present day; but at all events there is something to be said upon the point.' The sentence last quoted, to say the least, leaves the correctness of the decision in *Reg.* v. *Collins* an open question, and is wholly inconsistent with the judgment delivered by his lordship in *Reg.* v. *Brown*, purporting, as we have seen, to over-rule that decision [1].

Curiously enough the judgment just quoted had barely been delivered when the same judges sitting in the same Court for Crown Cases Reserved were called upon to consider a case in the same morning's cause list, stated by the Deputy Chairman of Clerkenwell Quarter Sessions, for the express purpose of terminating the doubts which, not unnaturally, had arisen as to whether *Reg.* v. *Collins* had been over-ruled by *Reg.* v. *Brown*. The case so stated was *Reg.* v. *Ring* [2] (1892) (61 L. J. (M. C.) 116; 66 L. T. (N. S.) 300; 8 Times Reps. 326; 56 J. P. 552) in which the facts were on all fours with those in *Reg.* v. *Collins*. The prisoners had been convicted of an attempt to steal. The evidence proved that they had tried to pick the pockets of several female passengers at a railway station. There was no evidence that there was anything in the pockets of the unknown females, no one having been in communication with them. Counsel appeared for the Crown, but none for the prisoners, and the point of law does not seem to have been argued at all. Lord Coleridge C.J. again delivered the judgment of the entire Court, which as reported was brevity itself, being merely declaratory of the law, no arguments being referred to, or reasons for the judgment given. The following is the full judgment, as obtained from a collation of the various reports:—'This conviction must be affirmed. The case was stated by the learned Deputy Chairman to ascertain whether *Reg.* v. *Collins* is still law. That case is no longer law. It was over-ruled by *Reg.* v. *Brown*, which

[1] Can it be that the learned judge had forgotten his decision in (1889) *Reg.* v. *Brown* (24 Q. B. D. 357)? That case was not cited by counsel for the Crown in *Reg.* v. *Duckworth*, in which, as commonly occurs in C. C. R. cases, no counsel appeared for the prisoner. A case of the same name (1883) *Reg.* v. *Brown* (10 Q. B. D. 381) was cited, but the synonymity is a mere coincidence, the two cases being in no way connected.

[2] Both cases, *Reg.* v. *Duckworth* and *Reg.* v. *Ring*, were heard and decided on Feb. 13, 1892. The cause list for that date contained some civil causes, and then three cases for the consideration of the C. C. R., of which the above were two, being separated by the third case. The three cases were heard and disposed of in the same order, *Reg.* v. *Ring* being last in the list on that day, which was a Saturday. The sitting of the Court therefore was not a long one, and the above two cases appear to have been disposed of, to say the least, somewhat rapidly.

was decided by five judges[1], and since this case will also be decided by five judges—of whom four are different judges—the learned judge who stated the case will have the satisfaction of knowing that now nine judges hold that *Reg.* v. *Collins* is bad law; and I hope that will be sufficient.' It must be confessed that both the manner and the matter of this deliverance leave much to be desired. As for the manner of it, the Lord Chief Justice, having regard to the terms of his reference, not only to the Court below in the case before him, but to the Court responsible for the decision in *Reg.* v. *Collins*, seems for the nonce to have forgotten Bacon's dignified observation concerning inconsistency of judgments; that, if it be that previous decisions must be set aside, they are at least entitled to honourable burial[2]. The matter of the judgment is equally unsatisfactory. It contains no legal reasoning; the argument is purely arithmetical, viz. 'nine[3] judges to five,' and conducted on the *numerantur non ponderantur* method. Even then the Lord Chief Justice's figures are not correct; for he overlooked the fact that to the five judges who decided *Reg.* v. *Collins* must be added the five judges who decided *Reg.* v. *M'Pherson* (three of whom were different judges), which case was after full argument deliberately followed in *Reg.* v. *Collins*. So that if any weight is to be attached to the mere counting of judicial heads, the correct result is that eleven[4] judges have in a somewhat heroic, not to say high-handed, and so to speak obiter-dictatorial, fashion over-ruled the deliberate judgments of eight judges of co-ordinate jurisdiction, on a point of law settled more than thirty-five years ago, and, during that period, not only respected, but regarded as a catena of authority uniformly acted upon in scores of criminal cases.

Moreover, it must be borne in mind, that the five judges who decided *Reg.* v. *Collins* did so after hearing full argument, both for the Crown and for the prisoner; whereas the seven judges, who we are now led to understand over-ruled them in *Reg.* v. *Brown*, did so in an *obiter dictum* judgment, in the absence of counsel, and consequently without hearing any argument at all, either for the Crown or the prisoner, and apparently without due examination of the authorities. Further, the Horatian line applies:—

> 'Vixere fortes ante Agamemnona
> Multi;'

which is, being translated, there were not a few 'strong' judges

[1] There is something wrong here. *This* (1889) *Reg.* v. *Brown* (24 Q. B. D. 357) was decided by seven judges. Is it possible that the learned Lord Chief Justice was looking at the report of *another* (1883) *Reg.* v. *Brown* (10 Q. B. D. 381) (as to which see above, p. 169, note 1) which *was* decided by five judges?

[2] 'Judicia enim reddita, si forte rescindi necesse est, saltem sepeliuntor cum honore.' Bacon, De Augm. Lib. viii. Aph. 95.

[3] Should be eleven, see below, and note 1 *supra*.

[4] See notes 1 and 3 *supra*.

before the present day. It may be doubted whether the profession generally will, in the circumstances above mentioned, regard with equanimity the unsettling of law as laid down by Cockburn C.J., Bramwell and Martin BB., Coleridge, Crowder, Willes, Williams and Crompton JJ. in *Reg.* v. *M'Pherson* and *Reg.* v. *Collins*, judicial judgments arrived at after full consideration, and which received the support of Lord Blackburn and Barry, Lush and Stephen JJ. as members of the Criminal Code Bill Commission, i. e. eleven judges in all, by the over-ruling judgments of another eleven in *Reg.* v. *Brown* and *Reg.* v. *Ring*, viz. Coleridge C.J., Pollock B., Field, Manisty, Cave, Day, Grantham, Hawkins, Wills, Lawrance and Wright JJ. The question of law is one which, notwithstanding what was said in *Reg.* v. *Ring*, ought to be still considered as, to say the least, open; and it is eminently a suitable subject for argument before the full Bench of Judges in order that it may receive that final consideration which it deserves.

The importance of the legal question involved in the case above referred to, and the necessity for its re-discussion *ab initio* with a view to its final and authoritative determination, has, still more recently, been made apparent by certain judicial utterances in two or three cases, in which, it is submitted, the same principle, though not precisely the same point, was involved.

Less than six months after the decision in *Reg.* v. *Ring* the case of *Reg.* v. *Waite* ('92, 2 Q. B. 600), stated by Wright J. for the opinion of the Court for Crown Cases Reserved, came before Coleridge C.J., A. L. Smith L.J., Pollock B., and Cave and Bruce JJ. It is unnecessary for the present purpose to refer to the point actually decided. It is sufficient to say that Coleridge C.J., after referring to the extent of the applicability of the rule at common law, as laid down by Lord Hale, that there is a *praesumptio iuris et de iure* that a boy under fourteen is under a physical incapacity to commit certain sexual offences, said:—'The question whether he (the prisoner, a boy under fourteen) could be convicted of the attempt does not arise, but it certainly seems to me that a person cannot be guilty of an attempt to commit an offence which he is physically incapable of committing; that question however can be dealt with when it arises[1].'

A few months later the same question arose in another similar case, also stated by Wright J. for the opinion of the Court for Crown Cases Reserved, *Reg.* v. *Williams* ('93, 1 Q. B. 320). Wright J. at Assizes had directed the jury that the prisoner (a boy under fourteen)

[1] A. L. Smith L.J. expressed no opinion on this head, observing that the question of attempt did not arise in the case; the conviction having been for the full offence. The rest of the Court concurred.

could not be convicted of the felony charged, nor of any attempt to commit such felony. No counsel appeared for the Crown or for the defendant in the Court for Crown Cases Reserved, consisting of Coleridge C.J., Hawkins, Cave, Day, and Collins JJ. Lord Coleridge in giving judgment again expressed his opinion that the defendant 'could not be convicted of attempting to do that which the law says he was physically incapable of doing.' Hawkins J. in his judgment on the other hand said, 'I do not assent to the notion that a boy cannot be convicted of an attempt to do that which the law says he cannot do.' Cave J. on this point said he desired a further discussion of the question before deciding it; but at present he was inclined to concur in the opinion expressed by Hawkins J., in which Day and Collins JJ. also concurred. Comparing the two cases last referred to with those previously dealt with, an inconsistency of decision seems apparent. It is not a little surprising to find two judges, Coleridge C.J. and Wright J., who in 1892 held that in law a person *can* 'attempt' to steal from an empty pocket, holding in 1893 that in law a person *cannot* 'attempt' to commit an offence which he is physically incapable of committing. Hawkins J., on the other hand, consistently with his concurrence in the decision of the Court in the pocket-picking case, expressed his opinion that in the later case the boy could have been convicted. And it is indeed difficult to see upon what principle any distinction can be drawn between the two classes of cases so far as the law of 'attempt' is concerned. In both the crime intended to be committed is impossible of completion; in the one case because, the pocket being empty, there is no material upon which the offender can operate; and in the other case, because there is in fact, or by a legal fiction, the effect of which is equivalent to a fact[1], so to speak, no instrument, which the offender can employ to carry out his criminal intention. The idea that there can be an attempt, notwithstanding the absence of material to be operated upon, but that there cannot be an attempt because of the absence of an instrument or operating agency, is worthy of *Tristram Shandy*; as Lord Justice Bowen once remarked, anent a suggestion of counsel that in the interval between decree *nisi* and absolute the parties to a divorce suit were in such a peculiar relation that intercourse between them might constitute adultery[2]. So far as the actual possibility of committing the intended crime is concerned the *impotentia* exists in both the above classes of cases,

[1] The presumption of *impotentia* under the age of 14, being a *praesumptio iuris et de iure*, is irrebuttable; and therefore, as Coleridge C.J. pointed out in *Reg.* v. *Waite* ('92, 2 Q.B. 600), judges have time after time refused to receive evidence to prove that a particular prisoner was in fact capable of committing the offence.

[2] *Stanhope* v. *Stanhope*, (1886) 11 P.D. at p. 104.

though in a different way. *Lex non cogit ad impossibilia* is a maxim which might well be supplemented by a new maxim, *Lex non id crimen vocat quod est impossibile;* unless indeed that other maxim, *Voluntas reputabitur pro facto*, must be deemed to have been revived by certain of the decisions above criticized. It is however difficult to believe that the law of 'attempt,' applicable in such cases as are above dealt with, is, or—after due examination of the authorities of a more thorough kind than seems as yet to have been made by any of the judicial tribunals before which the question has hitherto directly or indirectly come for consideration—would be held to be different, according as the *impotentia* is, so to speak, inherent in the subject-matter, or is inherent in the agent by means of which subject-matter is sought to be operated upon. Some points involved in the discussion of the question under consideration suggest legal quillets, and exercises in scholastic logic, of a kind in which Aquinas and his brother schoolmen, writers of patristic and mediaeval divinity, would have fairly revelled. Certain other kindred topics of argument, and analogies, which occur to us, suggested by the judgments in *Reg.* v. *Waite* and *Reg.* v. *Williams*, however fitting they might have been for detailed disquisition in such a work as Sanchez's *De Matrimonio*, are wholly unsuitable for discussion in the pages of this REVIEW.

Apart from the practical question what the law of 'attempt' in such cases as those we have been discussing is, there is the further practical and important question, what the law should be. Whatever the existing law may be finally held to be; in popular parlance, and in public opinion, as distinct from legal definition, a man who, with felonious intent, thrusts his hand into an empty pocket, which he believes to be full of gold, but in fact finds empty, is as guilty of an attempt to steal as though the pocket had been in fact to his knowledge full of gold. The moral guilt of the offender is the same in both cases, but as the danger to the public is not equally great there is room for considerable divergence of opinion as to whether the criminal law should punish both cases alike as an attempt. Thus, although, as we have seen, Mr. Justice Stephen acquiesced in the proposal of the Criminal Code Commission of 1879, of which he was a member, to alter the law as laid down in *Reg.* v. *Collins* so as to make the fruitless endeavour to pick an empty pocket an 'attempt' to steal; he, personally, as appears from, and for the reasons given in, the passage in his History of the Criminal Law of England above quoted[1] is of opinion that the alteration of the law proposed by the Draft Code of 1879 (an alteration, if the latest decisions in *Reg.* v. *Brown* and

[1] Page 167.

Reg. v. *Ring* are to stand, now practically effected by judicial decision) is harsh. The opinion of the learned author on such a point is especially worthy of consideration; for, to adopt the language of well merited compliment paid to him by the present Lord Chief Justice, 'he knows these things, as we all know, with great particularity, and has gone into them, more than any other member of the Bench[1].' In support of the view taken by Mr. Justice Stephen, opposing any alteration in the law, it may be remembered that even if such offences as we have been considering are not punishable at law as 'attempts,' the offenders need not be allowed to go scot free. Thus, in the pocket-picking cases, there seems to be no reason to doubt that the prisoners, if they had been charged with committing an assault with intent to commit a felony, could have been convicted of a misdemeanour, with the liability to a maximum punishment of two years' imprisonment with hard labour[2]. Again, in the class of cases represented by *Reg.* v. *Williams*[3], even though the offender cannot be convicted either of the felony charged, or of an attempt to commit such felony, he can be, as in that case, found guilty of the misdemeanour of indecent assault, with the same maximum punishment as that just mentioned. Such punishments appear sufficiently adequate, so far as their deterrent influence is concerned.

One word in conclusion on another practical matter. The decisions in some of the above cases, to which it is one of the objects of this article to call the attention of those whom it may concern, afford a striking commentary on the conditions under which much of the work of the Court for the Consideration of Crown Cases Reserved is done. Celerity in the determination of causes is no doubt a blessing. It is, moreover, facilitated by the simple plan of hearing no argument at all, or argument upon one side only. But accuracy is an even better boon than rapidity of decision. In only one of the eight cases dealt with in this article counsel appeared both for the Crown and for the defendant before the Court for Crown Cases Reserved; in five of the cases counsel appeared to argue for the Crown alone; in the remaining two cases—in one of which, as we have seen, well settled law was deliberately set aside by the judgment of the Court—no counsel appeared at all. 'God forbid,' exclaimed Chief Justice Abbott, 'that it should be imagined that an attorney or a counsel, or even a judge is bound to know all the law[4]!' And it is not surprising that even a number of judges should, on occasion, fall into grave error, if they essay to

[1] *Reg.* v. *Brown* (1883) 10 Q. B. D. at p. 384.
[2] See Stephen, A Digest of the Criminal Law (Crimes and Punishments), 3rd ed. p. 38, n. 8.
[3] *Supra*, p. 171.
[4] *Montriou* v. *Jefferys*, (1825) 2 C. & P. 116.

decide off-hand difficult legal questions, without more examination and research than the Court can give while sitting, and without having the advantage of the assistance of counsel, to present arguments based upon an adequate investigation of authorities conducted before coming into Court. We take leave to doubt whether the decisions of the Court for Crown Cases Reserved, in the cases adversely commented upon above, would have been arrived at, if counsel had been, before the hearing, assigned to the prisoners, and both sides of the argument had been threshed out. To assign, as is often done, counsel to a prisoner on his trial at the Assizes where the facts are elicited, but not to do so, when the case in which those facts are stated comes before the Court for Crown Cases Reserved, for the opinion of the Court on a question or questions of law of general interest and importance, shows, it is submitted, a regrettable omission, and a curious inconsistency of procedure, which occasionally results in a not less curious inconsistency of judicial decision.

SHOWELL ROGERS.

[This article, in which Sir James Stephen's works are frequently cited, was written and revised before his lamented death. Mr. Rogers now desires to signify his concurrence in the general feeling of respect and admiration which has been shown both within the legal profession and outside it. What I could myself say of Sir James Stephen for the moment I have said elsewhere. Here it may be fitting to remember that he was one of the first contributors to this REVIEW.—F. P.]

FOREIGN COMPANIES IN ITALY.

THE Italian law of Companies being of comparatively recent date, a few notes as to its provisions with regard to foreign companies established in Italy may possibly not be without interest.

The Code of Commerce of 1882 deals with foreign companies in its section viii, book i, ch. ix, arts. 230, 231, 232, and divides them into two very distinct and separate categories:—

1. Foreign companies establishing in Italy 'a secondary seat or representation' (una sede secondaria od una rappresentanza).

2. Foreign companies having in Italy their 'seat and the principal object of their undertaking' (la loro sede e l' oggetto principale della loro impresa).

As these two classes are very differently treated, it may be as well to consider first the criterium by which they are to be distinguished.

This is a matter by no means easy of decision. The law has not laid down any express rules with respect to it, and has refrained from attempting any definition of the words 'oggetto principale,' which, as may be imagined, have given rise to a considerable number of decisions. The only safe conclusion to be drawn from them appears to be that every case will be decided upon its own merits, and from a practical and common-sense point of view of the question, 'is the principal object of the company in question *really* in Italy.' Nevertheless if it can be shown that the company *may* have important objects in other countries, even though no evidence can be given of its operations in such countries at the moment, the Italian Courts are chary of deciding that the '*principal*' object is in Italy. It is accordingly the practice to insert in the memorandum of association of such companies incorporated here as intend to establish themselves or to conduct operations in Italy, a provision that the objects of the company are to do certain things in Italy *and in other countries*, or words to a similar effect, and to adopt a name which is not of too exclusively Italian a character.

It must not be overlooked, moreover, that the law requires the two elements—viz. that the seat of the company *and* the principal object thereof should both be in Italy—to bring the company within this second category, and it has been held that the 'seat' required must be the principal seat of operations and not a mere branch of less importance than the office situate in the country of origin.

Let us now consider the respective situations of these two classes of companies:—

I. *Companies establishing a branch* (sede secondaria) *or representation in Italy.*

The situation of such companies is governed by art. 230, sections (1), (2), of the Code of Commerce, which are as follows [1]:—

'230. Companies legally constituted abroad which establish in the kingdom a branch or representation are subject to the dispositions of the present code concerning the deposit, the registration, the placarding and publication of the memorandum, articles, and other instruments modifying the one or the other, and of the balance-sheets; they shall moreover publish the names of the persons directing or administering such branches, or who otherwise represent the company in the kingdom.

'These persons are responsible towards third parties in the same manner and to the same extent as the directors of Italian companies.'

This latter provision is of considerable importance, inasmuch as it establishes that even though the company be a foreign one and governed, as to its corporate status, by the law of its domicile, yet the directors of such a company are responsible to the public and the shareholders in Italy in the same manner as the directors of an ordinary Italian company. This responsibility is defined by art. 147 [2], which is as follows:—

'The directors are jointly and severally responsible towards the shareholders and towards third parties:—

'1. For the reality of the payments made by the shareholders.

'2. For the actual existence of the dividends distributed.

'3. For the existence of the books required by law and for their being regularly kept.

'4. For the exact fulfilment of the deliberations of general meetings.

[1] '230. Le società legalmente costituite in paese estero, le quali stabiliscono nel Regno una sede secondaria od una rappresentanza, sono soggette alle disposizioni del presente codice riguardanti il deposito e la transcrizione, l' affissione et la publicazione dell' atto costitutivo, dello statuto, degli atti che recano cambiamenti all' uno od' all' altro, e dei bilanci; devono publicare inoltre il nome delle persone che dirigano o amministrano tali sedi, od altrimenti rappresentano la società nello stato.

'Queste persone hanno verso i terzi la responsabilità stabilita per gli amministratori delle società nazionali.'

[2] '147. Gli amministratori sono solidariamente responsabili verso i socii e verso i terzi:

'1°. della verità dei versamenti fatti dai socii;

'2°. della reale esistenza dei dividendi pagati;

'3°. dell' esistenza dei libri voluti dalla legge e della loro regolare tenuta;

'4°. dell' esatto adempimento delle deliberazioni delle assemblee generali;

'5°. e in generale dell' esatta osservanza dei doveri ad essi imposti dalla legge, dall' atto costitutivo, e dallo statuto e che non siano proprii esclusivamente di un ufficio determinato e personale.'

These provisions are similar to those contained in the codes of Belgium and Brazil.

'5. Generally for the exact observation of the duties imposed upon them by law, and by the memorandum and articles, and which are not exclusively proper to any particular or personal office.'

The above formalities of registration of the memorandum and articles, &c., required alike for Italian and for foreign companies in Italy (arts. 90, 91, 92, 93, 94, 95, and 98), are the only ones necessary in the case of a foreign company of the first category. The form of such memorandum, &c., does not concern Italian law, in accordance with the generally recognized principle 'locus regit actum,' nor their contents (save in so far as they may infringe any rule of public policy or the law as to immoveables) in conformity with the general principles expressed in article 6 of the preliminary chapter of the Civil Code [1], which is as follows:—'The status and capacity of persons and family relations are governed by the laws of the nation to which they belong;' and in art. 3 [2] of the same Code, 'Foreigners are admitted to the enjoyment of the civil rights conferred on Italian citizens.' With respect to the latter article it was, however, for some time doubtful whether it applied to foreigners who had only a corporate existence as companies. But this doubt was set at rest by a decision in the affirmative of the Supreme Court of Turin of Nov. 18, 1882 [3].

Let us now consider the situation of the second class of companies.

II. *Companies having in Italy their seat and principal object.*

The situation of such companies is exceedingly simple. They are treated in all respects as if they were Italian companies, incorporated under Italian law. Art. 230, section (3), is as follows [4]:—'Companies constituted abroad having in the kingdom their seat and principal object are considered as Italian companies, and are subject, even for the form and validity of their memorandum and articles, although drawn up abroad, to all the dispositions of the present code.' Inasmuch as some of 'the dispositions of the present code' are of a very stringent character, especially with regard to the profits of promoters [5], which the law has apparently endeavoured

[1] 'Art. 6. Lo stato e la capacità delle persone ed i rapporti di famiglia sono regolati dalla legge della nazione a cui esse appartengono.'

[2] 'Art. 3. Lo straniero è ammesso a godere dei diritti civili attribuiti ai cittadini.'

[3] Cf. also 'Lo stato civile dei stranieri in Italia,' by Signor Pappafara, advocate at Zara, and an article on the same subject by M. Maurice Baudoin Bugnet, Juge suppléant du tribunal civil de Melun, in the 'Bulletin mensuel de la Société de législation comparée,' June—July, 1893.

[4] '230. . . . Le società costituite in paese estero, le quali hanno nel Regno la loro sede e l' oggetto principale della loro impresa, sono considerate come società nazionali e sono soggette anche per la forma e validità del loro atto costitutivo, benchè stipulato in paese estero, a tutte le disposizioni del presente codice.'

[5] Art. 127.

to make practically impossible, it may readily be conceived that foreign companies intending to operate in Italy are very much concerned to avoid being classed in the second category, and that considerable ingenuity is exercised in practice to avoid what is usually considered a most undesirable consummation. Moreover, the fact that half the capital of an Italian company has to be deposited at the Treasury, and only the moderate interest derivable from Government securities is available in respect of it, and that—in addition to a tax on immoveables of 33 per cent.[1] and a very heavy income-tax, which are of course applicable to foreign corporations in Italy as well as to Italian companies proper—there are several other taxes which are leviable upon the latter alone, it will at once be evident that it is as much to the interest of the Italian Government that all foreign companies in Italy should be considered as Italian under this article, as it must be that of such companies to escape the status in question. Indeed the company law of Italy, as a whole, appears to be of so Draconian a character, besides bringing into the coffers of the fisc under one guise or another so large a portion of the profits of companies incorporated under it, that one is inclined to wonder how Italian companies contrive to exist at all, with any satisfaction to their shareholders, and indeed it is believed that since 1882 the number of companies formed abroad for operation in Italy has enormously decreased.

Such are the principal features of the law of Italy with regard to foreign companies.

If we glance at the legislation of other European states on the same subject we find considerable similarity with the Italian law in some of them.

Portugal, in her Code of Commerce of 1888, has adopted the Italian system bodily, articles 110 and 111 being almost literal translations of art. 230 of the Italian Code. 'Art. 110. Companies formed abroad but intending to have in the kingdom a branch and to exercise there their principal industry will be considered for all intents and purposes as Portuguese companies, and will be subject to all the dispositions of the present code.'

'Art. 111. Companies legally constituted abroad which establish in the kingdom a branch or any other representation are subject to the dispositions of the present code concerning the registration and the publication of their memorandum and articles, and of the powers of their representatives, in the same manner as Portuguese companies

[1] The Hôtel du Quirinal in Rome, for instance, pays 50,000 lire (£2000) per annum in respect of this tax.

of the same kind, and with regard to bankruptcy are subject to the terms of art. 745, sect. 1.

'The representatives of the companies referred to in the present article assume the same responsibility towards third parties as the directors of Portuguese companies.'

In France foreign companies are governed by the law of May 30, 1857; and, as regards English companies, by the terms of the treaty between Great Britain and France of April 30, 1862, entered into in pursuance of the law of 1857. The system is so far similar to that in force in Italy that all companies whose 'principal establishment' is in France are considered as French companies, and are subject in all respects to French law, although they may have been incorporated abroad, under a foreign law, and although all their shareholders are foreigners[1].

In Belgium the system is practically identical with that of France; every foreign company whose principal establishment is in Belgium is subject to Belgian law, even though its memorandum and articles have been drawn up abroad in conformity with a foreign law (Law of the 18th of May, 1873, art. 129), and the memorandum and articles, balance-sheets, &c., of foreign companies establishing a branch or any kind of office in Belgium must be registered according to Belgian law (ibid., art. 130), and the directors of such companies incur the same responsibility as those of Belgian companies.

In Spain the Code of Commerce[2] requires that foreign companies operating in the Peninsular should conform to the law of their own country with respect to their capacity to contract, and with that of Spain as to all that concerns the 'creation of their establishments on Spanish territory, their commercial operations, and the jurisdiction of the Spanish tribunals.' Moreover, if they establish a branch in Spain they must register their articles, &c., in the same manner as in Italy.

In Germany foreign companies establishing a branch in the empire are similarly required to execute the formalities prescribed by the Code of Commerce.

So also in Mexico, where the recent Code of Commerce requires from foreign companies the publication of their annual balance-sheet and of the names of their directors[3].

[1] Aix 5 août 1868 (S. 1868, 2. 334), Cass. 29 avril et 28 octobre 1885 (R. S. 1885, p. 92), Seine 12 décembre 1885 (S. S. 1888, p. 104), Seine 17 janvier 1888 (S. S. 1888, p. 425).

Cf. also Lyon-Caen et Renault, 'Traité des Sociétés commerciales,' p. 823, and Houpin, 'Traité théorique et pratique des sociétés par actions françaises et étrangères,' T. i. p. 5.

[2] Articles 15 and 21, last paragraph.

[3] Articles 265–267.

It will thus be seen that the law of Italy with respect to foreign companies does not stand upon an absolutely unique basis.

But it is none the less questionable whether the general stagnation of business in that country at the present time is not largely attributable to the illiberal character of its commercial legislation, and whether Italy, at any rate, is not unwise to discourage in this manner the introduction of foreign capital and foreign enterprise. For it must by this time be evident to every one but the most bigoted patriot, having any acquaintance with that country, that in spite of the boastful adage to the contrary, current during the first outburst of enthusiasm consequent upon the dawning of a new era, 'Italia *non* se farà da se.'

MALCOLM MCILWRAITH.

ACTIO PERSONALIS MORITUR CUM PERSONA IN THE LAW OF SCOTLAND.

THE principle of law embodied in this maxim has been recently examined in the Scots Courts in *Bern's Executor* v. *Montrose Asylum*, June 22, 1893, 20 R. 859. Shortly stated, the plaintiff's action was for payment to him as Executor of his deceased wife of £500 in name of damage and *solatium*, or alternatively, to him as an individual, of a like sum, and was laid on the ground that his wife had been grossly maltreated by those in charge of her while she was an inmate of the defendant Institution—her death, indeed, which occurred while she was still insane, being alleged to be due to the ill-treatment she received. On the facts disclosed it was held that the plaintiff's wife's death was not due to the fault of the defendant's servants, and the plaintiff at the hearing of the appeal did not insist on his title to sue as an individual, but insisted that personal injury had been inflicted on his wife, and that he, as her Executor, had a title to sue for damages in respect thereof. The Lord Ordinary (Kincairney) being of opinion that the claim transmitted to the plaintiff as Executor, the First Division of the Court of Session appointed the case to be heard before seven Judges, on account of its difficulty and importance. The Lord President (Robertson), Lords Young, Adam, Mc Laren and Kinnear, were of opinion that an Executor has no title to raise and follow out an action of damages for personal injury inflicted on the deceased person he represents. The Lord Justice Clerk (Kingsburgh) and Lord Trayner dissented.

With deference, it is submitted that the opinion of the majority of the Court is erroneous, and regret must be felt by many jurists that this branch of Scots Law formerly in advance of, should have been brought into conformity with, the rule of the English Common Law, a rule at once barbarous and without plausible ground. The reasons assigned for the judgment by the majority of the Court in the case under consideration were—

(1) *That in England, the American States, France and elsewhere no such ground of action is recognized.* However desirable it may be to bring the Laws of England and Scotland into uniformity, this is no sufficient reason for forcing upon the laws of one country a rule which has nothing to recommend it. In a matter open to less

serious criticism the Scots Courts did not accept the English law of 'Common Employment' till it was thrust upon them by the House of Lords.

(2) *That there is no trace in the Books of the recognition of such a right, and that a more limited right is given to Executors, viz.:—the right to follow out and insist in an action which has been raised by the injured person himself.* The first part of this proposition is referred to afterwards, the second is not worth attention, except indeed as an argument for the position we are maintaining.

(3) *That the injured person may have had good reasons for not insisting in an action in view of the fact that his character, health, losses in business and the like would be subject to investigation, and that if he did not raise an action it should be denied to his Executor* 'who has sustained no injury, and who merely wishes to make money out of the suffering of the deceased, *per* Lord Mc Laren, p. 863.' In the present case this argument cannot apply, as the injured person was insane at the time when the alleged cause of action emerged, and died before being in a position to instruct an action to be raised, or even to appreciate that any right to recover damages had arisen to her. Take even a stronger case. Suppose that *A* inflicts such ill-treatment upon *B* that the latter becomes insane, and in course of, say, a few weeks dies from the result of *A*'s treatment, without regaining his reason. Is *A* to go free simply because his victim was rendered incapable of instructing his solicitor? A law which answers this in the affirmative is difficult to support.

But it is submitted that in Scotland the question was not open and that the case of *Auld* v. *Shairp*, Dec. 16, 1874, 2 R. 191 (approved of in *Wood* v. *Gray & Sons*, '92 A. C. 576, *per* Lord Watson p. 580), should have been followed in *Bern's Executor* v. *Montrose Asylum.* The case of *Auld* was raised by the Executrix (the widow) of Dr. Auld, who was for some time Classical Master in Madras College, St. Andrews, against the Principal of the United College at St. Andrews for damages in respect that the defendant by retaining a professorship, after obtaining an appointment as Principal, and by slanderous statements regarding the deceased had prevented the latter from being appointed to the Chair of Humanity. In that case, raised two years after Dr. Auld's death, the plaintiff undoubtedly alleged injury to herself, as well as to her husband, but the wrong done to her, if any, was an immediate consequence of the wrong done to Dr. Auld, and the only question raised was precisely the one raised in *Bern's case.* It was, however, upon this point of patrimonial loss that the majority of the Court distinguished the two cases. But are there grounds of distinction sufficient to enable the Court, with reason, to say that in the one

case we are to recognize the Executor's right to raise an action, in the other we are to deny it? Take the case of a slander—*par excellence* a personal injury. That may affect, and affect materially, the value of the personality. Imagine part of the estate to consist of the good-will of an old-established and prosperous private Bank, and that shortly before the sole partner's death an unfounded allegation has been made that his house is in financial difficulties. Is no action to lie in such a case as that?

It is not our object, however, to repeat the arguments which have been adduced, both in England and in Scotland, against the rule embodied in the maxim. Our object rather has been to note that in their zeal to assimilate the laws of the two countries, the Scots Courts have taken a retrograde step. Looking to the opinion of Lord Watson in *Wood's case* (*supra*) we are hopeful that if the point comes before the House of Lords in a Scots Appeal a return will be made to what we submit common sense demands, and Scots Law allowed, prior to *Bern's case.*

R. M. WILLIAMSON.

REVIEWS AND NOTICES.

[Short notices do not necessarily exclude fuller review hereafter.]

The Referendum in America. By ELLIS P. OBERHOLTZER. Publications of the University of Pennsylvania, Philadelphia. 1893. 225 pp.

MR. OBERHOLTZER'S book is a most seasonable and a most important publication.

The book is seasonable because the Referendum or the 'People's Veto' occupies the attention of publicists throughout Europe, and will probably soon command the attention of the people of England.

The book is important because it contains a whole body of useful information about the nature and the operation of the people's veto in America.

Some of the results contained in or suggested by Mr. Oberholtzer's treatise may be summed up in the following statements.

First. The Referendum, though its name, which comes from Switzerland, is little known in the United States, is there an institution of indigenous growth and exists in one form or another in almost every State of the Union.

Secondly. The Referendum as practised in America is a merely negative exercise of popular authority. It is a veto, and moreover a veto on legislation. It has no connexion with the settlement of differences of opinion which may divide the two Chambers or Houses which constitute one legislative body. Whether in England the people's veto might or might not be employed to terminate conflicts between the House of Lords and the House of Commons is a matter on which in these pages it is unnecessary to express an opinion. All that need be said is that American constitutionalism affords no precedent for such employment.

Thirdly. The Referendum is at once a Democratic and Conservative institution. It is Democratic because it increases the power of the citizens by giving them a part in legislation, at any rate when it is legislation of a constitutional character. It is Conservative because whenever it is applied it increases instead of diminishing the checks on legislation.

Fourthly. The Referendum as it exists in the States of the Union is all but invariably applied to constitutional legislation, but it is also often applied in one shape or another to legislation which does not affect the constitution.

Fifthly. When the purely negative character of the Referendum is realized, an historical analogy suggests itself to which Mr. Oberholtzer does not, we think, call attention. The Referendum corresponds in modern Democratic constitutions to the veto of the Crown under the ancient constitution of England. The veto of the sovereign people is exactly analogous to the veto of the sovereign king.

Sixthly. The people's veto works satisfactorily and without any particular difficulty among the English people on the other side the Atlantic. In considering, however, its operation in America as a check on constitutional legislation, it is necessary to bear in mind that every American State has a written constitution, and that the Americans have either invented or acclimatized one of the most important pieces of legislative mechanism, namely the 'Constitutional Convention.' A. V. D.

The Principles of Pleading in Civil Actions under the Judicature Acts. With observations on indorsements on writs, trial without pleadings and other business preliminary to trial. By W. BLAKE ODGERS, Q.C. Second Edition. London: Stevens & Sons, Lim. 1894. 8vo. xxxix and 315 pp. (10*s.* 6*d.*)

THE appearance of a second edition of this useful handbook of practice, incorporating and explaining the New Rules of November 1893, will be warmly welcomed by the common law junior, the bulk of whose daily work is concerned with the subjects of which it treats.

The 55 pages which have been added to the first edition, consist mainly of the first three chapters, which deal respectively with 'Indorsement on Writ,' 'Procedure under Order XIV under New Rules,' and 'Proceeding to Trial without Pleadings.' Of these the second and third chapters are entirely new, while the first chapter is chapter vi. in the first edition in an enlarged and amplified form.

The working of the new system of trial without pleadings is made abundantly clear by twenty-four useful precedents. We do not agree with the author's suggestion on p. 33 that it would be well if cases of this class 'could be placed in the same special list' as actions in which leave to defend is given under O. XIV. Wills J., to whom the common law 'short cause' list has been assigned, has repeatedly protested against any but the shortest cases being placed in his list, while our author's precedents show that trial without pleadings is intended to be applicable to lengthy actions of tort of no real urgency, which have certainly no claim to priority over actions of commercial importance.

Dr. Odgers, at pp. 22, 23, shows his usual clearness in endeavouring to thread his way through the conflicting and unsatisfactory decisions as to how far a specially indorsed writ must set out all the material facts necessary to constitute a complete cause of action, according to the rules applicable to an ordinary statement of claim. Till this has been more clearly and definitely settled by judicial authority, we accept our author's view that *Fruhauf* v. *Grosvenor* (67 L.T. p. 351) 'is still the law.'

The volume before us has been enriched by the addition of some more valuable precedents, and the most recent decisions from every series of reports have been incorporated in the text. The saying that 'the young lawyer learns his law at the expense of his clients' has hitherto been especially true as to questions of practice. The book before us, however, goes far towards providing the same royal road to a knowledge of practice, which so many excellent text-books have during the last twenty years furnished to a knowledge of substantive law. It supplies a distinct and long-felt want for those who are seriously endeavouring to make the practice of the law their profession. S. H. L.

The Principles of the Law of Evidence. By W. M. Best. Eighth Edition. By J. M. Lely. *With Notes to American and Canadian Cases.* By Charles F. Chamberlayne of the Boston Bar. London: Sweet & Maxwell, Lim. Boston: The Boston Book Co. 1893.

The eighth edition of Best on Evidence appears eleven years after the second. This seems to indicate a steady demand for it, explicable by the fact that it is more coherently written, much more of a book and less of a dictionary, than the standard work of Taylor, and that Stephen's Digest, and the various works more or less modelled upon it, require a great deal of labour to be rightly apprehended by the conscientious student. Best is a good book for a person to read who comes fresh to the study of the Principles of Evidence. Decisions upon points of evidence are less frequent now than in the days of special pleading, and thus it is not unnatural that the more important part of the new matter in the present edition is concerned with statutes, of which the application is largely to the Criminal Law. With reference to the cases in which young children are permitted to give evidence not upon oath, we have sought in vain for any mention of the Prevention of Cruelty to Children Act, but inasmuch as the book contains no index to statutes it may be rash to say positively that there is none. Upon the more important subjects of the competence to give evidence of accused persons and their wives or husbands, Mr. Lely, the present editor, is betrayed into one or two errors of fact. Thus he says that 'the Criminal Law Amendment Act of 1885 affords the only instance of an accused person being enabled to give evidence on a charge of felony.' This is inaccurate, as there is another instance in s. 4 of the Explosive Substances Act 1883 (46 Vict. c. 3, s. 4). The reason of this particular proviso, however, was probably less the general view of the subject now widely taken, than the fact that this section throws upon the accused the *onus* of proving that his possession of explosives is lawful, as by the ordinary principles of law it would be presumed to be. Mr. Lely thinks that the 'authority in favour of an alteration of the law' whereby all accused persons should be competent witnesses, 'is now so great that it would be waste of time to controvert it.' No doubt the preponderance of such authority is great, but it consists largely of the opinions of men like the late and present Lord Chancellors and the Master of the Rolls, who have had far less opportunity than some of their colleagues of observing personally the practical working of the rule of competence. It would be highly desirable to obtain full statements on the point from the judges of the Queen's Bench Division who have been presiding in Crown Courts for the last six or seven years, and if this were done some conscientious advocates of reform might be considerably surprised. An interesting and rather well-executed feature of this edition is the 'American Notes' added by Mr. Chamberlayne, of the Boston Bar, at the end of each chapter, touching the American and Canadian cases that have been quoted. We could wish that the radically false and misleading distinction between so-called 'direct' and so-called 'circumstantial' evidence had been excised, but perhaps that would, in the editor's judgment, have been taking too great a liberty with the original text, excused as the blunder is by the example of Bentham, and other writers who ought to have known better. We are glad to note that though the book has been printed, for copyright purposes, in America, the spelling is in accordance with English rules.

The Law of Executors and Administrators. By SIR EDWARD VAUGHAN WILLIAMS. Ninth Edition, by the HON. SIR ROLAND L. VAUGHAN WILLIAMS, Knt. In two vols. cxvi and 2131 pp. La. 8vo. London: Stevens & Sons, Lim.; Sweet & Maxwell, Lim. 1893. (£3 18*s.*)

THE new edition of 'Williams on Executors' deserves the highest compliment which it is in our power to pay it. It has been constantly used during some four busy months and it has never been found wanting. It is a book which has a great reputation to sustain. Probably there is no text-book which is in constant use both in the Temple and in Lincoln's Inn stands higher. And the ninth edition does nothing to detract from that reputation. It is a quarter of a century since the last edition by Sir Edward Vaughan Williams was issued. Since then the book has been in the hands of Mr. Justice Vaughan Williams and his late brother—*hereditas paterna et fraterna*—the Judge is now solely responsible. One hardly likes to think how many Acts have been passed or how many cases decided since 1868 which must needs be incorporated in the book to bring it up to date. To do this and yet maintain the text of the original is a task the difficulty of which can only be realized by those who have tried it. Upon a single point only have we found a joint—not loose but—insufficiently strong in the Vaughan-Williams harness. There is a familiar paragraph in the text which reproduces the rule laid down in 1858 by *Whicker* v. *Hume* (7 H. L. Cas. 124) as to the law of the place of domicil deciding the validity of a will. Upon the formal validity of a will as distinguished from its material validity a change was made in 1861 by Lord Kingsdown's Act, 24 & 25 Vict. c. 114. It is hardly enough to warn the reader of this change in the law by a mere 'See however' in a note. This *sed vide* should have been limited by the character of the Act. The real use of a text-book is however as a hunting-ground, and no lawyer ought to pass by such a reference as this to an Act of Parliament without reading the Act for himself. One other quarrel we have with the book, and that is an inevitable quarrel with the length of the 'Addenda and Corrigenda' caused by the interval which elapsed between the time of the work leaving the hands of Mr. Justice Vaughan Williams and the date of publication. Apart from these things, and they are small things, the ninth edition of 'Williams on Executors' is as good and as carefully edited a text-book as there is to be found among the tools of a lawyer's trade.

A Treatise on the Law of Partnership. By the Right Hon. Sir NATHANIEL LINDLEY. Sixth Edition. By WALTER B. LINDLEY; with an Appendix on the Law of Scotland, by J. CAMPBELL LORIMER. London: Sweet & Maxwell, Lim. 1893. La. 8vo. lxii and 939 pp.

THE passing of the Partnership Act, 1890, has made it necessary to alter the form of Lord Justice Lindley's well-known treatise to some extent. Equity lawyers need not be told that, as the Partnership Act was in almost all respects a purely codifying Act, any material discrepancy of substance between this standard text-book and the Act would go to show that the Act had so far failed of its purpose. But we are not aware of any such. We commend to law reformers the introductory remarks on codification. Lord Justice Lindley points out—adding the great weight of his authority and experience to opinions already expressed by others to the same effect—that

the difficulty of codification lies much more with the awkward form of our legislative machinery than with the subject-matter in itself. 'It is matter of amazement that Englishmen should be content to have the laws by which they are governed in such an inaccessible shape as they are; but no doubt one explanation of this state of things is the hopelessness of passing through Parliament without mutilation any carefully considered exposition of any great branch of law.'

Practising lawyers will regret that the learned author and editor continue to give references only to the Law Reports for current cases.

Mr. Campbell Lorimer's appendix of notes on the Scots law of partnership with reference to the Act is a new feature, and ought to add to the usefulness of the book.

The Sale of Goods Act, 1893. With Notes. By FRANK NEWBOLT. London: Sweet & Maxwell, Lim. 8vo. xiv and 181 pp.

THE promptitude with which Mr. Newbolt has brought out a working edition of this Act does not seem to have prevented him from making it accurate and, so far as important English decisions are concerned, comprehensive enough for all practical purposes. We think it would have been an improvement to notice the decision of the Supreme Court of the United States in *Norrington* v. *Wright*, which will certainly have to be considered by our Courts when they deal again with the vexed question of the effect of failure in delivering one or more out of several instalments of goods contracted for. This question is purposely left by the Act (ss. 10, 31) where the existing English authorities leave it.

The comment on s. 4 (= s. 17 of the Statute of Frauds) is wisely made very short. We trust that not many members of the profession are in need of the explanation that 'the Statute of Frauds'—which was passed by the English Parliament many years before the Union—'did not apply to Scotland.'

If Mr. Newbolt intends his handbook to be used by business men as well as lawyers, he may find it desirable in a future edition to be a little more discursive for the benefit of the lay people, on such matters, for example, as the distinction between *condition* and *warranty*.

The Law of Bankruptcy. Seventh Edition. By GEORGE YOUNG ROBSON. London: William Clowes & Sons, Lim. 1894. 8vo. lxii and 1310 pp. (38*s*.)

As a thorough treatise on bankruptcy law, remarkable for a clear elucidation of principles, Mr. Robson's work has long been held in high estimation. A new edition bringing up the work to date will be a welcome guest in a complete law library.

Mr. Robson's book, well thought out and arranged at the outset, has, in successive editions, embodied the changes introduced by legislation during a period of thirty years, while constantly keeping in view the relation of later Acts to the principles established under former ones. In the fifth and sixth editions the important changes of the Act of 1883 were incorporated, and a crowd of cases following upon the Bills of Sale Act of 1882 were dealt with.

In the present (seventh) edition the changes made by the Bankruptcy Act, 1890 are incorporated, as well as the provisions of the Act of 1887 for discharge of bankrupts and closure of bankruptcies under former Acts. The

Bills of Sale Acts 1878 and 1882, with the decisions under them, are separated from the rest of the work, and treated by themselves in the concluding chapter. The list of cited cases—notwithstanding the omission of many obsolete cases under former Acts—amounts to between 5000 and 6000.

The list of *addenda* and *corrigenda*, consisting of nearly two pages of close print, looks, at first sight, large. The *addenda* consisting of cases from the later reports of 1893 are doubtless inevitable; but some of the *corrigenda* might perhaps have been rendered unnecessary by exact care in a final revision of the copy, as, for instance, at p. 816, where a section of the Debtors Act, 1869 is set forth, which is clearly spent and has been formally repealed by S. L. R. 1883. This is, however, a small blemish in an edition which, on the whole, maintains the character of careful execution which has marked Mr. Robson's book throughout, and now presents a result of accumulated and well-directed industry, assuring its position as an established standard. R. C.

The Law and Practice of Bankruptcy. By the Hon. Sir Roland L. Vaughan-Williams. Sixth Edition. By E. W. Hansell. London: Stevens & Sons, Lim., and Sweet & Maxwell, Lim. 1894. La. 8vo. lxxxviii and 896 pp. (25*s.*)

In the preface to his work on Specific Performance, Fry L.J. combats the notion that books written or revised by authors on the bench possess a quasi-judicial authority, and Kekewich J. in *Union Bank* v. *Munster* (37 Ch. D. 51, 54) judicially confirms this view. Such books, however, certainly enjoy a superior degree of extra-judicial esteem in the profession. 'Williams on Bankruptcy,' having made its reputation long before the author was raised to the Bench, fully deserves the promotion it now receives. Opinions may differ, do differ as to whether a subject like Bankruptcy, largely statutory but with a vast accretion of case law, is best treated under titles or sections; our own preference is for titles, but sections are probably more popular. It is significant, however, that even in the treatment which we have here by sections, what are in form annotations really expand into titles or treatises; for instance the notes on s. 4 (acts of bankruptcy), s. 44 (property of bankrupt divisible among his creditors), or ss. 37, 40 (proof and priority of debts). In this way the two methods meet. The index is excellent, the cases are dated and references are given to several sets of reports. He must be an exacting person who could wish for a better book than this.

The Mark in Europe and America: a Review of the Discussion on Early Land Tenure. By Enoch A. Bryan. Boston, U.S.A.: Ginn & Co. 1893. Sm. 8vo. vi and 164 pp.

Mr. Bryan's survey is from the point of view, which we suppose must now be called the fashionable one, of those who conceive Mr. Seebohm and Fustel de Coulanges to have demolished something called the 'mark theory.' That theory, in its complete dogmatic form, was never really maintained by any writer of repute, except perhaps Emile de Laveleye; but no doubt it was exaggerated, from twenty to ten or twelve years ago, in much second-hand teaching and writing, as Mr. Seebohm's and Fustel's work not improbably will be for the next dozen or score of years. And, as it has recently started up again, without any kind of critical qualification, in Mr. Shaw-Lefevre's otherwise careful and meritorious book on 'English

Commons and Forests,' we cannot say that the needful business of correction is wholly done. When Mr. Bryan explains how little real evidence there is for historical survival of the Germanic 'mark' in American townships, he contributes a definite and useful element to the discussion. Otherwise we think that Dr. Andrews's 'Old English Manor,' as it is certainly a fuller guide than this little book, is also a safer one. No one admires Fustel de Coulanges' brilliant qualities more than we do. But we must really remind those who go about to conjure with his name in early English economic and legal history that Fustel had, to all appearance, never read a single English document. If he had, his views on one or two Continental problems might possibly have been more or less modified. See further Dr. Andrews's remarks on this work in the *Political Science Quarterly* for March. F. P.

Cases and Opinions on International Law, with Notes and a Syllabus. By FREEMAN SNOW. Boston: The Boston Book Company. 1893. 8vo. xl and 586 pp.

The author, in applying the 'case system' to the teaching of International Law at Harvard, felt the need of some compendious collection of cases, which might be handled by his students. Hence the work before us, which is an improvement in several ways upon what has hitherto been the only book of the sort in the English language, the 'Leading Cases' of Mr. Pitt-Cobbett. The later is upon a considerably larger scale than the earlier work, from which it differs in giving the decisions of the courts textually, rather than by way of abridgement, and in being confined almost exclusively to cases which have been the subject of actual litigation. In this respect Mr. Snow's work differs also from the *Causes Célèbres* of G. F. Martens, the *Causes Célèbres du Droit Maritime* of De Cussy, and Wharton's *Digest of International Law*, which are all occupied with diplomatic, rather than with forensic, discussions. By a wholesome innovation upon the haphazard arrangement of 'Leading Cases' of which Mr. J. W. Smith's well-known book set the example, Mr. Snow's cases, like those of Mr. Pitt-Cobbett, are distributed under appropriate headings, in accordance with a methodical grouping of the whole subject.

The cases are well chosen, with a not unnatural leaning to American decisions, adequately set out, and helpfully annotated. The author shows no undue national bias, as will appear from his remarks upon Barundia's case, Cutting's case, and the Behring Sea controversy. He might perhaps with advantage have devoted more space to the rights and duties of belligerents *inter se*; and would perhaps have done well to indicate in some way, upon the face of such cases as *Wolf* v. *Oxholm* and *Church* v. *Hubbart*, their doubtful authority.

The body of the work is preceded by a 'Syllabus' of topics, well grouped under 195 headings, with references under each to the revelant passages in the text-books. It is followed by an appendix of useful documents, such as Lieber's Instructions, and the War Manual of the Institute of International Law.

Abstract of Reported Cases relating to Trade Marks (between the years 1876 and 1892 inclusive), with the Statute and Rules. By JAMES AUSTEN-CARTMELL. London: Sweet & Maxwell, Lim. 8vo. xviii and 417 pp.

A NEW book on the subject of Trade Marks might justify its appearance on the ground of its being a useful text-book or a digest in which every

point of law as yet decided in this connexion could be easily referred to; but we cannot congratulate the author of the present volume on having fulfilled either of these conditions very satisfactorily. Considered as a text-book, it contains no attempt at editing nor any preface from which the reader might gather a general idea of the history of the law on the subject. As a digest, the book suffers from the want of classification—the arrangement of cases being merely alphabetical, which is perhaps the least useful system to adopt. As a digest, moreover, the work is not sufficiently full, though the author, it is true, in the Preface limits its scope to presenting in a convenient form the salient portions of reported cases decided between 1876 and the end of 1892. Marginal notes again would have been useful to catch the eye, and the headnote given in each case is hardly sufficient as a summary of its main features. To condense a judgment is a work of some difficulty, and in the present instance the reader is liable to be misled owing to the occasional capricious omission of the asterisks which are employed in the text to denote where a word or sentence has been left out. The text is moreover not always faithfully transcribed, as for instance, in the extract from the judgment of Lord Justice Cotton on page 65, where the words 'discretion to register,' should be 'discretion to refuse to register.' A copious and correct index to some extent redeems the want of classification in the subject-matter.

A Handbook of Husband and Wife according to the Law of Scotland. By FREDERICK PARKER WALTON. Edinburgh: William Green & Sons. 1890. 8vo. lxxii and 510 pp.

THE author of this book has rendered the task of the reviewer very difficult by making the confession that he was the author of the delightful little book 'Marriages Regular and Irregular,' reviewed in L. Q. R. ix. 291. By this confession he leads us to expect a high standard of excellence, and we have not been disappointed. One important feature in the book before us is the freedom with which the author cites English cases; he defends, we think successfully, this practice in the preface, citing *Collins* v. *Collins*, 11 R. H. L. at p. 23 (S. C. 11 App. Ca. at p. 230). Some of the most interesting parts of this book to an English lawyer are the discussions of domicile, capacity to marry, and the essentials of marriage. The chapter on 'Jus Mariti' may be studied with advantage by every lawyer who is preparing a settlement on the marriage of an Englishwoman with a domiciled Scotchman. There is a most interesting discussion at p. 79 as to whether a marriage celebrated *in facie ecclesiae* can be set aside for want of consent. The author is of opinion that 'a case might arise in which a regular marriage should be set aside on this ground. Marriages celebrated *in facie ecclesiae* have been frequently avoided on the ground of force, fraud, or error—and these are only different ways of proving want of mutual consent.'

On the whole we cordially commend this book to the attention of our readers, both Scotch and English, and we venture to predict that it will be successful.

We have also received:—

Commercial Law: an Elementary Text-Book for Commercial Classes. By J. E. C. MUNRO. London: Macmillan & Co. 1893. 8vo. viii and 191 pp. (3*s.* 6*d.*)—This book is published as one of a series of elementary commercial class-books. It will be useful not only as a book for students preparing for

the examinations now held or recommended by various authorities on commercial education, but also as an elementary hand-book of commercial law for persons engaged in business.

The matter is well selected and the arrangement intelligible. There are four parts. The *first* part contains a brief enumeration of the mercantile persons and mercantile property treated of. In the *second* part, contracts are treated with relation to general principles: (1) how contracts are made, (2) what persons are capable of contracting, (3) the form of and consideration for contracts, (4) what if the contract is illegal, or (5) its performance impossible, (6) consequences of mistake or fraud, (7) the transmission of rights and liabilities, and (8) performance breach and discharge. The *third* part treats specially of the leading commercial contracts: (1) Partnership, (2) Principal and agent, (3) Sale of goods, (4) Insurance, (5) Guarantees, (6) Charter-parties and Bills of lading, and (7) Bills, Cheques, Promissory notes, and I.O.U.'s. The *fourth* part contains a very brief account of the principles of bankruptcy law. And the *fifth* part treats of 'the application of law.' That is to say, by the law of what country is a particular question to be determined?

The style is clear and concise; and it is refreshing, even to a lawyer, to see well-known principles stated briefly, stripped of the modifications of special and exceptional circumstance, and without the inevitable reference of the text-books to *Buddle* v. *Muddle*, 9 T.R. 1000.

If the book comes into general use for educational purposes, its commercial success will be well deserved. R. C.

Les Waréchaix: étude de droit foncier ancien. Par PAUL ERRERA. Bruxelles: Alfred Vromant & Cie, 1894. 8vo. 35 pp.—In Flemish and Low German 8th–10th century documents, *watriscapum* and other variant forms doubtless mean some sort of easement *ejusdem generis* with the universal 'aquis aquarumve decursibus' of Romano-Germanic conveyancing. But from the 13th century onwards we find *warescapium*, etc. (in modern French orthography *waréchaix*) meaning not an easement but a subject of easements or common rights, and not necessarily connected with water. In fact 'common lands' would generally be a proper English rendering. M. Errera thinks this is a different word going back to *war*, *were*. The rights of lords and tenants in these lands appear as more or less unsettled, but it seems clear that the lord and the tenants together could do as they pleased with them. In modern times the courts do not seem to have worked out any definite theory of their legal position. M. Errera's introductory paragraph contains a significant correction of theories lately (perhaps still in some quarters) current as to archaic notions of property. 'Le domaine collectif *où plutôt le sol non encore approprié en certaines parties*, telle est la caractéristique de cet état de choses.' We quite agree.

The Trustee Act, 1893, with Explanatory Notes and Forms. By A. R. RUDALL and J. W. GREIG. London: Jordan & Sons. 1894. 8vo. xxxii and 232 pp. (6*s*. net.)—This is a useful and carefully worked-out little book on the new Act. The schedule in Appendix I, showing the sections of the Act and the sections to which they correspond in the repealed Acts and the sections of the latter Acts which are still unrepealed, is especially useful. The Rules of the Supreme Court (Trustee Act) 1893 were published whilst this book was passing through the press, and, with the forms forming Appendix K to the Rules of the Supreme Court, November, 1893, are set out *in extenso* at the end; but in a second edition they will no doubt receive the specific

explanation in connexion with the clauses of the Act, which they seem to us to require. For example, does O. LV. R. 13 A (c) enable an application for a vesting order under clause 31 of the Act to be made by summons, the word 'judgment' only being used in that clause?

A Digest of Civil Law for the Punjab, chiefly based on the Customary Law as at present judicially ascertained. By W. H. RATTIGAN. Fourth Edition. Allahabad: Pioneer Press. 1893. 8vo. xii, 177, and xxxi pp.—The fact that Dr. Rattigan's digest of Panjáb law is both meritorious and of great practical utility does not by any means prove that it would be wise or safe for the Government of India to charge itself with codifying Asiatic customs. Mr. Bogišić, in a much smaller, and one would think a safer field of experiment, deliberately left the law of the family out of the code of property law which he drafted for the Principality of Montenegro, and which has now been in force there for some years. Does Dr. Rattigan think the customs of mixed races and religions in the Panjáb a lighter thing to meddle with than those of uniformly Orthodox Slavs? Therefore we wish, contrary to Dr. Rattigan's expressed aspirations, that he may enjoy the honour and profit of many more editions of his Digest before there is any talk of turning it into an authoritative Code.

The Institutes of Justinian illustrated by English Law. By JAMES WILLIAMS. Second Edition. London: W. Clowes & Sons, Lim. 1893. 8vo. xx and 351 pp. (*7s. 6d.*)—This book seems intended for the use of students of Roman law who take up the Institutes after having made some acquaintance with English law. We should think it more embarrassing than useful to a learner who takes his Roman law first to try to pick up English law *pari passu* with his Institutes by means of a series of comparative notes. That some one does find the book useful is proved, however, by this being the second edition. Mr. Williams's statements of English law seem to be as generally accurate as can be expected, having regard to their brief and elementary character. It would have been better to quote less freely and with more critical discretion from unauthoritative text-books of both Roman and English law, and we do not think the latest editions have always been used.

On the Nature of State Interference. By HORACE SEAL. London: Williams & Norgate. [1893]. 8vo. viii and 96 pp.—In nature everything interferes with everything else, and only the very lowest individuals can be called individualist. Therefore increasing State interference in human society is part of a necessary and beneficent evolution. Such is the nearest approach we can make to a consecutive head-note for this little book. It is wonderfully desultory for its size, but a clever book withal; and it may well be found stimulating, which in speculative politics is the most that can be expected of any book short of a masterpiece. Its connexion with the Faculty of Law is somewhat remote: hence the brevity of this notice.

Social Evolution. By BENJAMIN KIDD. London: Macmillan & Co. 1894. 8vo. vi and 348 pp.—We have not had time to verify how far Mr. Kidd's book touches on the theory of legislation or any other topic properly within the province of law. One of his main points, apparently the central one, is that no rational proof can be given to the individual that his interest coincides with that of society, and this because in fact it does not. If this be so, law must of course be conceived not as a temporary but as a permanent and necessary constituent of social life. Mr. Kidd has some good critical points: thus he perceives that Mr. Herbert Spencer's political

philosophy is in essentials pure individualism. The book seems remarkable and likely to be fruitful.

The Statutes of Practical Utility . . . passed in 56 *&* 57 *Vict.* (1893), *alphabetically arranged, with notes thereon, and a copious Index.* By J. M. LELY and W. F. CRAIES. Vol. III. Part 3. London: Sweet & Maxwell, Lim.; Stevens & Sons, Lim. 1894. 8vo. 599–747 pp. (10*s.* 6*d.*)

A Treatise on Stock and Stockholders, Bonds, Mortgages, and General Corporation Law. By WILLIAM W. COOK. Third Edition. Two vols. Chicago: Callaghan & Co. London: Kegan Paul, Trench, Trübner & Co., Lim. 1894. La. 8vo. ccvii and 2068 pp.

The Revised Reports. Edited by Sir F. POLLOCK, assisted by R. CAMPBELL and O. A. SAUNDERS. Vol. XIII. 1811–1815. (2 & 3 Vesey & Beames—19 Ves.—14 & 15 East—4 Taunt.—3 Camp.) London: Sweet & Maxwell, Lim. Boston: Little, Brown & Co. 1894. La. 8vo. xvi and 842 pp. (25*s.*)

Index of Cases commented upon in judgments in the Court of Session and in Scottish Appeals to the House of Lords, 1862–1893. By P. J. HAMILTON GRIERSON. Edinburgh: W. Green & Sons. 1894. La. 8vo. vii and 473 pp.

Five Years' Railway Cases, 1889–1893 . . . *being a supplement to Railway Rights and Duties.* By JAMES FERGUSON. Edinburgh: W. Green & Sons. 1894. 8vo. viii and 124 pp.

The Annual County Courts Practice, 1894. By His Honour Judge HEYWOOD. Two Volumes. London; Sweet & Maxwell, Lim.; Stevens & Sons, Lim. 1894. 8vo. xxxii and 946, xiv and 438 pp. (25*s.*)

Les lois sociologiques. Par GUILLAUME DE GREEF. Paris: Félix Alcan. 1893. 8vo. 181 pp. (2 fr. 50).

Outlines of the Law of Torts. By R. RINGWOOD. Second Edition. London: Stevens & Haynes. 1894. 8vo. xli and 253 pp.

The Editor cannot undertake the return or safe custody of MSS. sent to him without previous communication.

THE

LAW QUARTERLY REVIEW.

No. XXXIX. July, 1894.

NOTES.

ORDER XLVIII A, r. 1, applies to any firm carrying on business in England, whether the firm is an English firm or a foreign firm, and whether it also carries on business in a colony or abroad or not. And a writ may be issued against the partners in the firm name without leave of the Court.

This is the technical point determined by the Court of Appeal in *Worcester City &c. Co.* v. *Firbank & Co.*, '94, 1 Q. B. (C. A.) 784, 9 R. May, 217.

The decision may seem to determine a mere matter of practice, but in reality it involves the whole theory of the limits of the High Court's jurisdiction over persons not resident in England, and suggests several important conclusions.

First. In an action against a firm the High Court claims jurisdiction over aliens no less than over British subjects merely on the ground of their carrying on business in England.

Secondly. *Worcester City &c. Co.* v. *Firbank & Co.* is distinctly opposed to the spirit of such cases as *Russell* v. *Cambefort*, 23 Q. B. Div. 526, *Grant* v. *Anderson*, '92, 1 Q. B. (C. A.) 108, *St. Gobain &c. Co.* v. *Hoyermann's Agency*, '93, 2 Q. B. (C. A.) 96, 4 R. 441.

Thirdly. From the above cases read together results a singular anomaly. If an alien carries on business in England, but resides abroad, then the mere fact of his carrying on business in England does not give the Court jurisdiction to entertain an action against him; but if a firm consisting of two aliens carries on business in England, but both of them reside abroad, then the mere fact of their carrying on business in England does give the Court jurisdiction.

Fourthly. The Rules of Court as to actions by and against firms contained in Order XLVIII A require revision; they are obscure in

themselves; the decisions of the Court of Appeal reduce them to hopeless confusion. The source of this confusion is not hard to discover. The Order was intended to deal with what may be called matters of form, and merely to make it possible to sue a firm or an individual under a trade name. But the Order has in fact raised some of the nicest questions of jurisdiction.

We suspend comment on *Hanfstaengl* v. *Empire Palace*, '94, 2 Ch. 1, C. A., until the judgment of the C. A. in *Hanfstaengl* v. *Newnes*, reported in the Court below 8 R. May, 127, is fully before us. The points actually decided are that (1) a group of living persons arranged after a picture and exhibited for gain does not infringe the copyright of the picture: (2) neither does a sketch taken from that group and published as an illustration of the performance and not of the picture.

In the *Chishima-Ravenna* case some important questions will have to be decided by the Judicial Committee. One is, whether under the existing arrangements for British Consular Courts in Japan a counter-claim by a British defendant against a Japanese, and especially against the Japanese Government, can be dealt with by such Courts. Another is, whether the Inland Sea of Japan is to be treated as a portion of the high sea or as Japanese territorial waters. The Chief Justice at Shanghai, reversing the decision of the Consular Court at Yokohama, decided that the collision which occurred in a narrow channel of the Inland Sea between the *Chishima*, a Japanese public ship, and the *Ravenna*, one of the Peninsular and Oriental Company's steamers, took place on the highway of nations, and that this was the same thing as saying that it occurred at a spot, which, for the purposes of the law administered in his Court, must be considered as the high seas. His decision was also in favour of the British company as regards the admission of the counter-claim, the jurisdiction exercised by his Court being exercisable under the order in Council 'upon the principles and in conformity with the law in force and for England.' As regards the legal position of the Inland Sea, the description given of it, viz. that it is entirely surrounded by Japanese territory and has four entrances, two extremely narrow, the third under two miles in width, and the fourth with two branches, the broader of which is about two miles wide, cannot be said to substantiate the assimilation of the waters in question to the high sea. The admission of the counter-claim under the circumstances raises the more delicate point of whether Japan, by renouncing her jurisdiction over British subjects sued on her own territory, can be considered

to have admitted that a Japanese sued by a British subject is also, if that British subject has a claim against him, obliged to submit to the British exterritorial jurisdiction. The Shanghai judge held that by coming into the British Court a Japanese accepts the British jurisdiction and procedure which allow the raising of a counter-claim, but there is the fact that the Japanese on their own soil have no means of reaching a British subject except through the British Court. He can, therefore, hardly be said to accept where he has no option.

How far can the jurisdiction of an inferior Court be extended by the action of the parties to proceedings before it?

This is a question which from one point of view presents some difficulty. It is on the one hand clear that the submission of a person against whom judgment is given does often give a tribunal jurisdiction against him which it would not otherwise possess. It is equally clear that the jurisdiction of a Court is a matter depending upon the law of the land and cannot be conferred upon it by the will of the parties who come before the Court.

Farquharson v. *Morgan*, '94, 1 Q. B. (C. A.) 552, 9 R. Mar. 190, will be found, if properly studied, to answer the question before us. No agreement can give an inferior Court jurisdiction. If it therefore appears on the face of the proceedings, or from the nature of the thing itself, that an inferior tribunal, e.g. a County Court, has decided a matter upon which it had no authority to adjudicate, then on the application of the party against whom judgment is given the High Court not only will, but must, issue a writ of prohibition, and keep the County Court within its proper sphere of action. If, on the other hand, the want of jurisdiction does not appear on the face of the proceedings or from the nature of the thing itself, but depends upon some fact which the party objecting to the judgment has to prove, then he may very well be precluded or estopped from raising the objection, e.g. if the fact be one which he might have brought before the attention of the inferior Court.

It is satisfactory to observe that the decision in *Farquharson* v. *Morgan* is based on principle and does not depend upon the existence of a formal record on the face of which the want of jurisdiction appears; for in a County Court there is no record (*ibid.*, p. 563, judgment of Davey L.J.).

Harris v. *Beauchamp Brothers* ('94, 1 Q. B. (C. A.) 801) shows that equity is still, to a certain extent, the handmaid of law, or perhaps rather a *dea ex machina* not to be invoked before terrestrial powers are

exhausted. The old jealousies are long ago dead. The substance of the thing is that there is no such thing as equitable execution, only equitable relief, and this is not to be given till execution at law has failed. 'Just and convenient' are not other than what they were before the Judicature Act. Horne Tooke when at school was asked why he had put a word in some case or mood, and answered 'I do not know:' so he was flogged. The next boy gave the rule. Tooke cried out, 'I knew the rule, but you asked me not for the rule but the reason, and I do not know that now.' The Court of Appeal has given the rule, as it was bound to do, but seems to feel much like Horne Tooke as to the reason. It is quite possible that the framers of the Judicature Acts did not fully realize how limited are the powers of Equity in its 'auxiliary' jurisdiction, and that an amendment extending the powers of the Court (as virtually suggested by Lord Justice Davey's considered judgment) would only carry out the original intention.

The way to the Law Courts, as to other less agreeable places, is paved with good intentions. This is the practical moral to be learnt from *Hebditch* v. *Mac Ilwaine*, '94, 2 Q. B. (C. A.) 54. The defendants, in writing to the parish guardians about the supposed misconduct of the plaintiff, acted with the best intentions. They meant to expose public misdoing as to a matter in which they themselves had an interest. But the defendants made two mistakes; they published in writing charges which they believed to be true, but in fact were not true, and they made these charges to persons who had no interest, and who were under no legal duty in respect of the matters to which the charges referred. Here, again, the defendants meant well. They thought that the parish guardians were the proper persons to whom to complain. But here, again, they were mistaken. They made, in short, a muddle of the whole business, and were fined £10 and, we suppose, costs, for their mistake. We do not profess to feel any pity for these victims of innocent ignorance. A man's character ought to be protected as much against negligent as against wilful falsehood.

Presumptions of law are not arbitrary rules. They are based on experience, giving rise to strong probability. If the law presumes paternity when the husband is within the four seas, it is because the husband generally is the father. If the law presumes 'omnia rite acta,' it is because business generally is transacted regularly and not irregularly. The law has also, in a long experience of human nature, discovered that when people propound a will which

they have been instrumental in preparing or obtaining, and under which they take a benefit, the will is one to be regarded with suspicion, *Tyrrell* v. *Painton* ('94, P. (C. A.) 151, 6 R. May, 1), and this adverse presumption it requires the propounder to rebut by satisfying the Court of the righteousness of the transaction, and that the will in question is the will of a free and capable testator. The suspicion may sometimes be groundless and defeat a genuine instrument, but in the interests of society it is best that legacy-hunters should know the difficulty of tampering with a testator.

We want a modern Hogarth to paint The Trustee's Road to Ruin. Scene 1, the cestuique trust, all smiles, asking him to act: scene 2, the absconding co-trustee or the deficient security: scene 3, the cestuique trust transformed into the pitiless plaintiff. This piece has been so often played at Lincoln's Inn with a tragic ending that we experience a genuine exhilaration of spirits at the good fortune of the executor in *In re Gasquoine* ('94, 1 Ch. (C. A.) 470). It may have been a little imprudent in the executors there to 'unregister' the bonds so as to give one of them—and that a stockbroker—the sole control, but *que voulez-vous?* It was the ordinary course of business to do so, and executors are not required to be wiser or better than the ordinary prudent man of business. *Thorne* v. *Heard* ('94, 1 Ch. (C. A.) 599, 7 R. Mar., 80) is another instance—this time of the beneficial operation of the Trustee Act, an Act which has recognised at last that trustees are to be treated with common humanity.

The practical effect of *Smith* v. *Hancock*, 7 R. June, 80, is neatly and completely stated in Lord Justice Lindley's judgment: 'Conveyancers will have to exercise their ingenuity in devising some method of stopping a wife with separate estate from carrying on a business in rivalry with a purchaser of a similar business from her husband. The agreement entered into in this case, to which the wife is not a party, does not cover such conduct, nor do the common forms at present in use.' Doubtless the conveyancers will look to it.

A railway company agree with a boy of 14, who is employed in a colliery, to carry him to and fro between the colliery and his home, and make it part of the agreement that neither he nor his executors, nor his relatives, should have any claim against the company for any injury to himself or his property caused by the negligence of the company or their servants. To put the gist of the agreement in the words of A. L. Smith L.J., it is

'in effect that if the company will carry the infant in their trains, he agrees that they shall not be bound to take any care in so doing, that they may be guilty of any negligence towards him, and however severely he may be injured in consequence, they shall not be liable to make him any compensation whatever.' *Flower* v. *L. & N. W. Railway Co.*, '94, 2 Q. B. (C. A.) 65, 68. The infant is injured through the negligence of the company. The Court of Appeal most justly hold that such an agreement is not a fair agreement to make with an infant, that it is void, and that he may recover damages for the injury done him.

Ought such an agreement as that relied upon in *Flower* v. *L. & N. W. Railway Co.* to be valid as against any one? We greatly doubt it. The agreement is unfair on the face of it. It is opposed to public interests. We are astonished that it should have been entered into by so respectable a body as the L. & N. W. Railway Co. The impolicy under the present condition of opinion of a company's making such agreements is patent. These are the kind of bargains which lead to ill-judged attacks on freedom of contract. Moreover it must always be remembered that in dealing with such bodies as railway companies, which occupy of necessity a position resembling that of a monopolist, private persons do not in reality contract freely. We hope that the Chairman of the L. & N. W. Railway Co. will read Flower's case, meditate upon it, and cause every agreement like that made with young Master Flower to be forthwith cancelled.

Given a debenture containing a covenant by the company to pay the money secured at a fixed date, what is the effect on the contract of the company liquidating before the date for payment? Fourteen years ago Hall V.-C. held in *Hodson* v. *Tea Company* (14 Ch. D. 859, 862, 49 L. J. Ch. 234, 236) that the effect was to accelerate payment. This authority Kekewich J. in *Wallace* v. *Universal Automatic Machines Co.* (8 R. Apr., 152) recently declined to follow, holding that the debenture holder had merely a right of proof, and a right to protection for his security by a receiver, not an immediate right of action for his principal. The Court of Appeal have, however (W. N. 1894, 94), declared Hall V.-C.'s view to be the correct one. The particular point is not of so much importance now, as the conditions inscribed on debentures nearly always make the principal immediately repayable on a winding up, but authority is much wanted on the general principle as to the precise effect of winding up on different classes of contracts by a company.

Wegg Prosser v. *Evans*, '94, 2 Q. B. 101, places a rather technical restriction on the operation of a technical rule. *Kendall* v. *Hamilton*, 4 App. Cas. 504, upholds the principle that an unsatisfied judgment against one co-contractor is a bar to an action on the same contract against another co-contractor. *Cambefort* v. *Chapman*, 19 Q. B. D. 229, in effect extends this principle and establishes that a judgment recovered on a bill or note extinguishes the original debt as between the plaintiff and the defendant. In *Wegg Prosser* v. *Evans* the Court decline to follow *Cambefort* v. *Chapman*, and hold that a judgment recovered by *A* against *X* on a cheque given by *X* in satisfaction of a guarantee given by *X* and *Y*, is not a bar to an action against *Y* on the original guarantee. In other words, the Court holds that the principle of *Kendall* v. *Hamilton* applies only where the cause of action, in respect of which judgment is recovered against *X*, is in the strictest and most technical sense the same as the cause of action in respect of which an action is brought against *Y*. Now no one, we think, can doubt that Wills J., in deciding *Wegg Prosser* v. *Evans*, showed his customary subtlety and his habitual desire to do justice in the particular case, but whether his intellectual acuteness was wisely exercised may admit of question. It is of great public importance that the law should be intelligible and logical. For the attainment of these ends, it is essential that full and fair effect should be given to principles established by decisions of the House of Lords. Now, full and fair effect is, we submit, not given by *Wegg Prosser* v. *Evans* to the principle established by *Kendall* v. *Hamilton*. That principle, it may be urged, is absurd. This contention we are not much inclined to dispute; there is no doubt that *Kendall* v. *Hamilton*, in its operation on partnership law, reversed what had long been received as a settled rule. It is a reason, however, for changing the law; it is not a reason for cutting down the effect of decisions which a judge cannot reverse.

The judgment of the Court in *Musurus Bey* v. *Gadban*, '94, 1 Q. B. 533, establishes or confirms, as far as a decision of a Court of first instance can do so, three propositions.

First. The immunity of an ambassador from process in the Courts of this country extends for such reasonable time after he has presented his letters of recall, as is necessary to enable him to wind up his official business and prepare for his return to his own country.

Secondly. This immunity is not put an end to by the appointment of the ambassador's successor.

Thirdly. Order XI does not nullify the effect of 4 & 5 Anne,

c. 16, s. 19, which in favour of a plaintiff suspends the running of the Statute of Limitations whilst the defendant is beyond seas.

This last proposition is of considerable importance, and though resting for the present mainly on the authority of a Court of first instance, is, it may with some confidence be asserted, sound. Rules of Court made by the judges under the authority of the Judicature Acts are meant to regulate practice. It can hardly have been intended by Parliament that these Rules should deprive a plaintiff of a substantial right or privilege conferred upon him by statute.

The damage in respect of which a trespassing animal, for example a pony belonging to *X* which has strayed into *A*'s field, may be distrained damage feasant, is not confined to damage to the freehold, but includes injuries to other animals, e.g. by kicking *A*'s filly. It follows therefore that while *A* has a right to distrain the animal he has not a right to bring an action for damages as long as he retains possession of the pony. These are the points of law which the plaintiff in *Boden* v. *Roscoe*, '94, 1 Q. B. 608, 10 R. June, 229, *nom. Roscoe* v. *Boden*, has been the means, at his own expense, not of establishing but of bringing into light. The case is very characteristic of English law. It turns on the meaning to be put upon the term damage feasant, and this again depends on the interpretation of dicta in decided cases and in Rolle's Abridgment. It is a peculiarity of the law that distress damage feasant, though essentially a temporary measure of self-protection, is treated as a substantive remedy while it lasts, and accordingly suspends the right of action. In early times the straying beast would commonly be one which the owner could not do without, so that distress damage feasant was no doubt an effectual way of bringing him to agree with his adversary quickly.

A, *P* & Co.'s manager and agent, without authority from *P*, draws out money in *P*'s name from *T* & Co., *P*'s bankers. *A* then either pays the money into *P*'s account, or else pays with it wages due to *P*'s workmen. Can *T* & Co., the bankers, who ought to have known that *A* had no authority from *P* to draw the money, recover from *P* the money so drawn? In *Reid* v. *Rigby*, '94, 2 Q. B. 40, the Queen's Bench Division, represented by Charles J. and Collins J., hold that they can. They cannot indeed recover it directly as money drawn out by and on behalf of *P*, for it appeared on the face of the cheque that *A*, *P*'s manager, had only a limited authority, but they can recover it as money had and received by *P*. The decision is certainly just, and is probably sound. It is impossible,

however, but that a doubt should suggest itself to critics, as it pretty certainly did to the judges, by whom the case was decided. The position of things is this: *A* fraudulently obtains money for his own purposes. He uses it indeed to replace the sum due from him to *P*, but he might have used it in any other way. Does the fact of *A* having paid *P* out of *T*'s money make the money when in *P*'s hands money of *T*'s received by him? If *A* had, out of the money fraudulently obtained, paid a debt due to his butcher, no one, we conceive, would assert that *T* could recover the money from *A*'s butcher.

There is no law against building castles in the air and mortgaging them if you can find any one to make advances on the security. In *In re Evelyn* (10 R. June, 294) the mortgagee had ventured into almost as airy a region. He had lent money on an undischarged bankrupt's contingent surplus, and not being paid he, after the manner of mortgagees, put up his security for sale. The trustee in bankruptcy, being also engaged in realizing the bankrupt's estate, objected to this as embarrassing—a sort of slander of title—but the Court did not see its way to an injunction against the mortgagee, inasmuch as he was only selling expressly by his conditions subject to the trustee's title. *Caveat emptor.* The theory of our law from the earliest times has been that bankruptcy only takes a man's property for the purpose of paying his debts. Subject to that, the surplus remains the bankrupt's property and may be dealt with by him.

Directors are, it is to be feared, generally the first instead of being the last to leave the sinking ship, and they too often get clear of the wreck. It is of no use for the articles merely to fix a qualification, because, though in such a case the articles give the terms on which the directors are serving, they do not constitute a contract by the director with the company, and without a contract no one can be made a contributory. Of course the director takes care, while the fortunes of the company are still doubtful, not to apply for his shares, and if his co-directors, in a fit of virtue, put his name on the register, he also takes care to know nothing about it, as, indeed, he is not bound to know. The Courts have, to some extent, outmanœuvred these directorial tactics by inferring a contract where a director has gone on acting under articles requiring him to qualify, and his name is found on the register for the requisite shares. Two recent cases, *Richardson's* case (7 R. June, 94), and *Cammell's* case (7 R. June, 71), are good instances of where the

Court will, and where it will not, infer a contract. But the matter ought not to be left to inference. Directors can always be fixed by a form of article like that in *Isaacs'* case ('92, 2 Ch. 158), that the director 'shall be deemed to have agreed to take' the shares.

A trading company losing a large part of its capital is such a common phenomenon nowadays, that it is well to know how it affects the dividend-paying powers of the company. An idea prevails—as *Verner* v. *General & Commercial Investment Trust* (7 R. May, 76) shows—that because a company's capital is irreducible, it must therefore be kept intact. This is a fallacy. It is contrary to the whole theory of joint-stock company enterprise. The subscribed capital is embarked, for better or worse, in a commercial venture with its attendant risks. All that the prohibition against reduction means is, that the subscribed capital is irrevocably dedicated to the objects of the venture, and the shareholders cannot divert it from those objects. To reduce it would be to divert it. The question in *Verner* v. *General & Commercial Investment Trust* is really one of business, not law, and it is not the province of the Courts to teach companies how to carry on their business. *British & American Trustee Co.* v. *Couper* (6 R. June, 10) is instructive on this head. The Court is not to dictate to shareholders how they are to reduce their capital, or insist on the reduction being a rateable one all round.

Any fond hope which directors or promoters may have indulged, that they were going to have things to themselves on a voluntary winding up, is now dispelled. Officialism has octopus-like stretched out an arm and grasped its prey (*Stock and Share Auction and Banking Co.*, 42 W. R. 300), in other words the Official Receiver has got a decision that companies liquidating voluntarily under supervision must comply with sec. 15 of the Company's Winding up Act, 1890—send, that is, a periodical statement with particulars as to the proceedings in and position of the liquidation, on peril to the liquidator of a fine of £50 per diem, and pay in any undistributed assets to the Company's Liquidation Account. It is somewhat odd that the Winding up Act should not have been more explicit on the point, but the construction put on the section by the Court is in furtherance of the policy of the Act and of commercial integrity.

Singer Manufacturing Co. v. *L. & S. W. Railway Co.*, '94, 1 Q. B. 833, in effect determines that a railway company have the same lien on goods left by a traveller at the company's cloak room as they have

on them when being duly carried by rail. The result follows that where a bailee deposits them at the cloak room of a railway station, the company can, on the bailment coming to an end, refuse to deliver up the goods to the owner until the cloak room charges are satisfied. The decision is a reasonable one. It would be unfair to railway companies, and in the long run inconvenient for the public, if the rights and liabilities of the company were varied by the mere fact of goods in their charge being moved from a carriage to a cloak room.

There has been a crop of cases lately in bankruptcy illustrating the hardship often suffered by solicitors, accountants and others dealing in good faith with a man who is on the brink of bankruptcy. A debtor may pay money to his solicitor to save his civil life (*In re Sinclair, Ex parte Payne*, 15 Q. B. D. 616) but not his natural life. A man charged, say, with a criminal offence hands over money to his solicitor to provide for his defence, becomes bankrupt, is tried and acquitted. The solicitor must refund the money to the trustee, though he has honestly expended it about the bankrupt's defence (*In re Beyts & Craig*, 10 R. Apr., 271). This seems inhuman, a practical denial of legal assistance. Welcome then *In re Charlwood* (10 R. Apr., 254), distinguishing *In re Beyts & Craig*, by virtue of there being a binding contract under the Solicitors' Act, and a lump sum paid over absolutely for definite services. Solicitors in future had better study this case attentively.

An undischarged bankrupt obtains credit to the extent of £20 without informing his creditor that he is an undischarged bankrupt. He has no intent to defraud. He is nevertheless guilty of a misdemeanour under the Bankruptcy Act, 1883, s. 31. To many readers of *Reg.* v. *Dyson*, '94, 2 Q. B. 176, this will appear a hard doctrine. It is natural to hold that a crime cannot be committed where there is no wrongful intention. The idea, though natural, is erroneous. The law often makes definite acts in themselves criminal, and the law is right. It is wise and just to punish acts which in ninety-nine cases out of a hundred are wrongful without requiring proof of wrongful intention. This is emphatically true of the illegitimate attempts of bankrupts to escape the natural penalties attaching to bankruptcy.

X is the member of a trading club which, being an unregistered association of more than twenty persons, is formed in contravention of the Companies Act, 1862, s. 4. *X*, to use popular language, steals

the money of the association. He can be convicted of embezzlement under 31 & 32 Vict. c. 116. This is the effect of *Reg.* v. *Tankard*, '94, 1 Q. B. 548, 10 R. May, 245. It is satisfactory that a decision which commends itself to every one's sense of justice should in this instance be the result of fairly construing an Act of Parliament.

A learned correspondent writes from Dunedin:—In the LAW QUARTERLY REVIEW for January of the present year there is a reference to the case of *Wheaton* v. *Maple & Co.*, '93, 3 Ch. (C. A.) 48, in which it was decided by the Court of Appeal that section 3 of the Prescription Act, 1832 (2 & 3 Will. IV, c. 71), did not bind the Crown. In New Zealand, where this Act is in force, the Court of Appeal in 1890 arrived at an opposite conclusion, and decided that section 3 does bind the Crown (*New Zealand Loan and Mercantile Agency Company* v. *Corporation of Wellington*, 9 N. Z. L. R. 10). The Court relied on Lord St. Leonards' opinion, Sug. V. & P. 491, 14th ed., and note; and Real Property Statutes, 13, 2nd ed.

It is difficult to say how the New Zealand Court of Appeal will deal with the question when it comes before the Court again, as probably it will. In *Trimble* v. *Hall* (5 App. Cas. 344) the Privy Council expressed the opinion that Colonial Courts should accept the decision of the English Court of Appeal on the construction of a statute as authoritative, and govern themselves by such decision.

[We regret that our space does not allow us to set out an extract from the judgment which our correspondent has kindly forwarded.]

A blot in the implied covenants of the Conveyancing Acts would seem to have been hit by the recent purchaser of Cumnor Hall, who complained, without effect, that Amy Robsart's ghost was not included. In these days of psychical research the question by what words a ghost shall pass deserves the attention of the few surviving pure conveyancers. We would suggest a form of this kind: 'Together with all ghosts, goblins, bogies, boggarts, boggles, apparitions, manifestations, spirits, wraiths, fetches, spooks and psychical phenomena whatsoever to the premises hereby granted or any of them appertaining, or the same or any of them commonly haunting or reputed to haunt, or therein or thereabout commonly seen, heard, smelt or felt, or reputed so to be, and the full benefit thereof.' In Latin formulas of the Carolingian style *cum omnibus larvis larvarumve decursibus* might possibly suffice. But many questions remain. Is a family ghost, like a villein, an incorporeal hereditament? Or is it in the nature of an heir-loom? Can one have seisin of a ghost, and how? Can a ghost be granted in

gross? Is there any and what difference between a lineal and a collateral ghost? If my family ghost walk in your close, shall you have an action against me? or is it a thing 'merely spiritual' whereof only the Court Christian has jurisdiction? Finally—and this may obviously be of great practical importance—is it within the Statute *De Donis*? If not, many ghosts must have been severed from their original freehold.

In a recent number of the *Revue Bleue* M. Max Leclerc, a pupil of M. Émile Boutmy's who has followed his master's example in careful study of English institutions, gave an account of the legal profession in this country, quite a friendly and sympathetic one. This is what he has to say of our system of legal education: 'Malgré tout, l'on peut dire dans un certain sens que le barreau est, en Angleterre, une profession savante.' The evidence taken before the Gresham University Commission upon this subject was not yet accessible at the date of writing this note, and nobody seemed to know when it would be.

A correspondent writes to us in favour of retaining Roman Law as a necessary part of legal examinations: 'My own experience has been that a little compulsory Roman Law—like a little compulsory several-other-subjects—has given me an interest in it, and has formed the groundwork of much further study.' We doubt whether such experience can be very common, but it is evidence, so far as it goes, against the view we expressed some time ago.

The Council of Law Reporting is at last officially aware that its works do not give perfect satisfaction. The Report for 1893, issued within the last few weeks, observes that 'the desire of the Council is to make their Reports as complete as possible.' Apparently, then, they are already, in the Council's official opinion, as accurate and workmanlike as possible. Such is not the general opinion of the Bar—not to speak of the Bar Committee. On p. 116 of the current Appeal Cases (May number), we read of Regulations for preventing collisions at sea of August 11, 1894. On p. 117 the date (presumably right) is 1884.

It appears from an article contributed by Sir Travers Twiss to a contemporary that he supposes Canciani's collection of 'Leges Barbarorum' to be at this day the natural and convenient place of

reference for the 'Leges Henrici Primi.' We should have almost expected the name of Thorpe to be known to Sir Travers Twiss, if not those of Schmid and Liebermann. But we cannot say we are much surprised.

Perhaps the most striking fact quoted in Mr. John Macdonell's instructive Statistics of Litigation is that while there were 75,458 writs issued in 1892 at the Central Office and the District Registries, the actual trials in Middlesex and London and at the Assizes were only 2,401. Here we have the automatic power of our law illustrated, and we may well be proud of it. It is not equally good hearing—at all events to the lawyer—that thirty years ago there were 100,000 writs issued in the Queen's Bench to 45,000 to-day, nay worse, only one person in 11,000 now goes to law, it seems, as against one in every 3,000 in 1823.

In those brave days our fathers
  Stood boldly for their law:
They sued their writs, they filed their bills,
  They chuckled at 'a flaw:'
They blenched not at the fluttering writ,
  Neat pleas and coy replies,
They faced the attorney's bills of costs,
  They d——d a compromise.

Now law is to the Briton
  More hateful than a foe,
He quails before the dreaded writ,
  He lets the judgment go:
And arbitrators bungle,
  And honest law grows cold,
And actions thrive not as they throve,
  In the brave days of old.

It seems convenient to repeat in a conspicuous place that it is not desirable to send MS. on approval without previous communication with the Editor except in very special circumstances; and that the Editor, except as aforesaid, cannot be in any way answerable for MSS. so sent.

In Memoriam.

I. LORD BOWEN.

WHEN Lord Bowen was appointed a Lord of Appeal last September, lawyers congratulated themselves that the Supreme Courts of Appeal of the Empire—the House of Lords and the Privy Council—would be strengthened by the presence of a lawyer of his great abilities, knowledge, and experience. His numerous personal friends looked forward to his finding a new field of interest for his energies, and comparative repose from the continuous work of the Court of Appeal. But those who saw him on his return to London, after the Long Vacation, were struck by the alteration in his appearance and the signs of feeble health, which were too manifest to be mistaken. He died on April 10. A memorial service in Lincoln's Inn Chapel was attended by numerous members of the Bench and Bar, who met to pay him a last tribute of affection and respect. There is nothing now left but to keep his memory green and living for future generations.

Charles Bowen was born on January 1, 1835, and was therefore in his sixtieth year when he died. He was the eldest son of the Rev. Christopher Bowen, of Freshwater, in the Isle of Wight. His mother survived him, and was with him during his last days. He went to Rugby at the age of fifteen, and was at once placed in the Fifth Form, in company with Mr. Robinson Ellis, the distinguished Professor of Latin at Oxford. His school contemporaries noted his versatility of mind, his rapidity of apprehension, and the promise of literary ability which he showed. From Rugby he went to Balliol College, of which he was first a Scholar and afterwards a Fellow, and finally he was the Visitor of the College. It is unnecessary to dwell on the brilliancy of his career both at school and at college. He was honoured and beloved by masters and tutors, and boys and undergraduates alike. He was distinguished in the football and cricket fields as well as in the class rooms. His tutor at Rugby was the present Dean of Westminster, and Jowett was at that time the senior tutor of Balliol. Both of these distinguished men were the closest friends of Bowen's manhood. One of his last public appearances was to do honour, in graceful and pathetic tones, to the memory of his master and dearest friend, whom, alas! he was soon to follow. Oxford, Balliol, and Jowett afforded a congenial education for a mind such as his. He was a considerable scholar, and loved scholarship, but did not live by scholarship alone. His

acquisitiveness and intellectual rapidity enabled him to gain a wider and deeper knowledge of the subjects of the final school than is usual even with the best men. The problems of mental and moral and political philosophy powerfully attracted his keen and subtle intelligence. History had less attractions for him, at any rate on its merely picturesque side. Those who desire to form an estimate of Bowen's literary style in his Oxford days may read with pleasure and advantage his Arnold Prize Essay on Delphi.

Like many able men of his time, Bowen left Oxford soon after taking his degree to read law in London. His tastes and aspirations were strongly in favour of an active life in preference to that of a student. He probably at that time—as indeed he did later—looked forward to political life. But he read law, as he did whatever he undertook, industriously and thoroughly. His great capacity, however, left time for the cultivation of society and for literary pursuits. He was soon introduced to Mr. Douglas Cook, who was the editor of the Saturday Review at its most brilliant period. Mr. Cook knew a good article when he saw it, and had the editorial art of knowing how to use other people's brains. Bowen soon became a regular member of the staff, which then comprised such men as Sir Henry Maine, Sir J. Fitzjames Stephen, Sir William Harcourt, Mr. George Venables, and Mr. T. C. Sandars. It is to be hoped that a selection of his articles may one day be republished. His literary style acquired the finish and fastidious taste which was afterwards found in his judgments. His articles were characterized by clearness of insight, refined irony, and wit. He occasionally wrote on social topics with inimitable lightness of touch and genial sense of the comic side of life. The privilege of anonymous authorship enabled Bowen sometimes to indulge his fun when the conversation fell on some article of his own. His criticism on himself drew down upon him, the writer remembers, upon one occasion, a look of withering scorn for his frivolity from a grave person. Now and again he would mystify with his irony some good soul deficient in a sense of humour.

Bowen was called to the Bar at Lincoln's Inn in January, 1861, on the same day as the present writer. Shortly afterwards he was married to the lady who lives to deplore his loss. Bowen joined the Western Circuit, and for some time experienced the traditional lot of the briefless barrister, and indeed he never had a large business on his circuit. His knowledge of law was accurate, and wider than that of most students and young barristers, but it may be doubted whether he had the qualities or the arts which attract provincial attorneys, or lead to rapid success at Quarter Sessions. Of course, with a man like Bowen, only the occasion was wanting

to secure his success at the Bar. The occasion was found in his friendship with Lord Chief Justice Coleridge, then one of the leaders of his circuit. Common Oxford associations, literary tastes, and political sympathy, as well as the personal charms of the brilliant young lawyer, attracted Mr. Coleridge, and the friendship between them lasted unbroken till it was severed by the hand of death. It is no secret that Mr. Coleridge sought and availed himself of Bowen's assistance in his work, and in the year 1873, being then Attorney-General, he appointed him junior Counsel to the Treasury, or (in the vernacular) 'Attorney-General's devil.' Bowen retained this office till he was promoted to the Bench in 1879.

Bowen now rapidly obtained a large junior practice in London. His clients included many of the great commercial firms. He then acquired the mastery of legal principles and thorough knowledge of commercial law which afterwards distinguished his judgments. At the same time he displayed on behalf of his clients the same conscientious, painstaking industry which was one of his most marked characteristics as a judge. His business, when he combined the Crown work with his private practice, was very large, and, notwithstanding the rapidity with which he worked, made a great tax on his physical strength and nervous system. But his work was always thoroughly done. It will be remembered that he was junior Counsel throughout the Tichborne case in all its phases. The final criminal trial entailed the loss of a Long Vacation and a severe strain on his health. Bowen had not a wide reputation as an advocate. Perhaps his refinement of thought and subtlety of expression interfered with his success in the ordinary run of advocacy. The present writer, however, has more than once heard a legal point argued by him with a directness, clearness, and force which left nothing to be desired. His services as a junior were invaluable to the leader who was so fortunate as to have his assistance.

In the year 1868 he found time to write a pamphlet on 'The Alabama Claims and Arbitration considered from a legal point of view.' His aim was to advocate the settlement of the American claims by arbitration, which had been proposed by Lord Derby's Government, but on terms not then accepted by Mr. Seward. In his pamphlet Bowen controverts the doctrine of 'Historicus,' 'that a neutral is entitled, without ceasing to be a neutral, to remit or assert as it chooses its neutral rights in favour of one belligerent,' which he describes as 'based, like most errors, on the perversion of a truth.' In opposition to 'Historicus' he laid down the formula 'that a neutral's duty is to vindicate its neutrality.' His argument is not only closely reasoned and expressed in terse and vigorous

language, but also shows the thoroughness with which Bowen finished his work. His exposition of the nature and limits of International law and national rights and wrongs deserves a more permanent place in legal literature than the pages of a controversial pamphlet. The doctrines of International law he describes as 'generalizations formed from observing the creed and practice of nations as recorded in history and summed up in authors of eminence.' 'Rights are those advantages which the law, or so-called law, says you are to receive in regard of the relations which it recognizes between you and others. Duties (relative not absolute) are the advantages which others are to receive in turn from you.' And he finds a higher sanction for the observance of International law than the mere feeling of fear in 'the universal and almost solemn conviction that it is well for humanity that communities should conform to the standard fixed by mankind's experience—a sense which tells with no common weight on the consciences of those who guide a nation's policy.' The pamphlet abounds with felicitous expressions and polished shafts of wit, some of which one is tempted to quote if space permitted. The reader will forgive the reproduction of the following: 'Some people have hinted that the North has no rights at all in the business. The rights violated (so runs the argument) are those of the neutral only. May not the neutral do what it pleases him with his own? If this were excellent learning it would be indifferent sense. In spite of local jurisconsults, America will still be of opinion that she was very closely concerned with the uninterrupted equipment in English ports of cruisers like the Alabama. The discussions of Didius and Phutatorius did not convince the Shandy family. "Let the learned say what they will, there must certainly"—quoth my uncle Toby—"have been some sort of consanguinity between the Duchess of Suffolk and her son." "The vulgar are of the same opinion"—quoth Yorick—"to this hour."'

In 1879 Bowen was appointed a Judge of the High Court in the Queen's Bench Division. The acceptance of a judgeship of course put an end to his aspirations for political life, which he had not ceased to entertain. He never actually stood for Parliament. He had many statesmanlike qualities, and many of his friends looked forward to see him occupy a high place in the counsels of the nation. It may be doubted however whether a man of his nervous and sensitive temperament would have been a great success in the House of Commons, or could have stood the hurly-burly of a contested election.

Competent observers have said that he was not so distinguished as a Judge of Nisi Prius as might be expected from his ability.

His subtlety of thought and language and refined irony were apt to pass over the heads of the juries and miss their mark. Amusing stories have been told of bewildered common jurymen under his direction, which perhaps have a fragment of ideal truth if not the truth of fact. But his wide and accurate knowledge both of Commercial and of Crown law, and the law of evidence and procedure, must have been invaluable in a great commercial case or in an important criminal trial.

Lord Bowen was appointed to the Court of Appeal on the death of Lord Justice Holker in the year 1882. It is upon his work there that his judicial reputation will rest. Law to Bowen was not a mere collection of rules, but was the embodiment of the conscience of the nation. He recognized the duty of endeavouring to apply legal doctrines so as to meet (in his own words) 'the broadening wants or requirements of a growing country and the gradual illumination of the public conscience.' He was therefore the master and not the servant of his knowledge. It might seem exaggerated if one said that he combined the breadth of Lord Mansfield with the accuracy of Lord Wensleydale, but it would give an idea of the truth. Lord Bowen will be remembered amongst the great judges who steered the ship in the transition from the old system to the new. The present writer is one of those who regret the present laxity of pleading and the abolition of demurrers, and think that to be obliged to state accurately your cause of action or defence or the facts upon which you rely saves confusion of thought and waste of time in taking evidence which not unfrequently turns out to be useless. It is doubtful whether Bowen altogether shared this opinion, and indeed a judge of his clearness of vision and accurate habits of thought could safely dispense with the aid of pleadings. Lord Bowen, in his anxiety that justice should be done, was indulgent (some of his colleagues thought over-indulgent) to slips of practice and mistakes. He would never let a client suffer if he could help it from the ignorance or carelessness of his advisers, or even his own obstinacy. One who sat with him for many years speaks of the extent to which he would 'let a blundering or obstinate litigant turn round and restate his case or get his case tried, or do whatever he wanted.' 'It arose,' he says, 'from his great fear lest the litigant should not in the end get what was his right in the beginning.' 'It may be asserted,' says Bowen in 1887, 'without fear of contradiction, that it is not possible in the year 1887 for an honest litigant in the Supreme Court to be defeated by any mere technicality, by any mistaken step in his litigation.' Some readers will perhaps think this boast a little rose-coloured.

The Master of the Rolls has recently spoken from the Bench in fitting terms of his late colleague's knowledge and mastery over legal principles, accuracy of thought, and the perfection of form in his judgments. To counsel he was always courteous, patient, and indulgent. He soon detected the weak point in your argument, and his questions were not always easy to answer, and sometimes it must be confessed even counsel who knew him well found a difficulty in following at once the course of his mind. His colleagues record the pains he took over every case that came before him, the thoroughness of his investigation of every point, and his sensitive anxiety that justice should be done. The colleague who has been already quoted writes as follows: 'What impressed me almost most of all about him was his intense sense of duty in the discharge of his office. Both intellectually and morally he was keenly sensitive to anything which appeared to him like the enunciation of bad law, or still more to anything like the slightest miscarriage of justice. Either of these things seemed to inflict a personal—almost a physical—wound on him: and the pains which he took both to do his own part in the administration of justice to the very best of his great abilities, and so far as he could to secure the very best working of the machinery of the law, were infinite. He never wearied of investigating or discussing a point so long as he thought that anything remained to be got at—or that there was any hope of bringing about an agreement of opinion amongst colleagues who were inclining to differ: and anything like a suggestion to him that he was worrying himself more than was necessary he always gravely put aside. I doubt whether those who listened to or read his brilliant judgments would have the least notion of how much thought and persistent effort he had given to them: and the extreme rapidity of his intellectual operations made this all the more remarkable to those who by daily intercourse saw "the very pulse of the machine." If Bowen had any personal ambition, it was entirely subordinated by him to the sense of duty to which I have referred—so completely that I do not believe that it was an efficient principle to any extent in his actions or his thoughts. Furthermore, I do not believe that he had any vanity. It is a very common characteristic of men of great abilities; but I never detected a trace of it in him.' Bowen assuredly had the genius which consists in the infinite capacity for taking pains.

An adequate appreciation of Lord Bowen's judgments can only be obtained by reading the Law Reports which contain them. There are who detect a tendency to rhetoric in some of his judgments, and he sometimes seemed to dwell on points which

suggested themselves to his subtle intellect more than was required for the decision of the particular case before him. But by universal consent there will be found in the series of judgments delivered by him a luminous interpretation of legal principles as applied to the facts and business of life expressed in language worthy even of his literary reputation. Of the many very valuable judgments delivered at the various stages of the case of *Angus* v. *Dalton* (3 Q. B. D. 85; 4 Q. B. D. 162; and 6 App. Ca. 740), on the nature of a right to support, and the extent to which such a right can be acquired by prescription, not the least valuable and suggestive is the careful and exhaustive opinion of Lord Bowen given as one of the Judges advising the House of Lords. In the course of it he makes the following pregnant observation:

'So long as the Courts of Common Law were hampered by the barriers between law and equity this doctrine ("the assumption of a possible lawful origin for long continued enjoyment") was stated in a necessarily narrow way as if it were some "legal" origin that ought to be presumed. At the present day, when law and equity are fused, the proposition may with advantage be recast in a more liberal form, namely, that the law will presume any *lawful* and not merely any *legal* origin consistent with the circumstances of the case;'

from which he draws an important conclusion:

'The question so far as lost grants and lost covenants are involved seems to me to have lost much of its practical importance owing to recent changes in the law. It would not now be sufficient to disprove a legal origin unless the possibility of an equitable origin were disproved as well.'

In *Thomas* v. *Quartermaine* (18 Q. B. D. 685) he expounded the meaning and limits of the maxim *volenti non fit injuria* and the doctrine of contributory negligence. His judgment in *The Baroness Wenlock* v. *River Dee Company* (36 Ch. D. 674 n. at p. 685) contains a clear and concise statement of the legal position as regards capacity to contract of a statutory corporation. In *Abrath* v. *North-Eastern Railway* (11 Q. B. D. 440) he discusses *more suo* the respective functions of judge and jury in actions for malicious prosecution. His judgment in *Dashwood* v. *Magniac* ('91, 3 Ch. 306) is a bold essay on the law of waste as applied to timber on a settled estate. In *Vagliano* v. *Bank of England* (23 Q. B. D. 243) the judgment of the majority of the Court which was prepared by Lord Bowen is an interesting and brilliant piece of legal reasoning, although the conclusion come to was not supported in the House of Lords.

One of Lord Bowen's most characteristic judgments both in form

and matter is in the case of *The Mogul Steamship Company* v. *M'Gregor* (23 Q. B. D. 598). The action was against a combination of ship-owners engaged in the China tea-trade for an alleged conspiracy to boycott the plaintiffs' ships by lowering or 'smashing' freights and offering other advantages to shippers. Speaking of the plaintiffs' claim to be allowed a fair rate of freight, Lord Bowen says that 'to attempt to limit English competition in this way would probably be as hopeless an endeavour as the experiment of King Canute.' He sums up his judgment in the following words:

'The substance of my view is that competition, however severe and egotistical, if unattended by circumstances of dishonesty, intimidation, molestation, or such illegalities as I have above referred to, gives rise to no cause of action at common law. I should deem it a misfortune if we were to attempt to prescribe to the business world how honest and peaceable trade was to be carried on in a case where no such illegal elements as I have mentioned exist, or were to adopt some standard of judicial "reasonableness" or of "normal prices" or "fair freights" to which commercial adventurers otherwise innocent were bound to conform.'

The case of *The Maxim Nordenfeldt Guns and Ammunition Company* v. *Nordenfeldt*, '93, 1 Ch. 630, contains one of Lord Bowen's greatest and most interesting judgments, from every point of view—on the application of the doctrine against restraint of trade to modern modes and conditions of business. After a complete historical résumé of the common-law doctrine to the present time, illustrated by an exhaustive reference to the decisions, he states his general conclusions in the following passages, which deserve quotation, as well for their own sake as because they are eminently characteristic of the author:

'A covenant in restraint of trade made by such a person as the defendant with a company he really assists in creating to take over his trade, differs widely from the covenants made in the days of Queen Elizabeth by the traders and merchants of the then English towns and country places. When we turn from the homely usages out of which the doctrine of *Mitchel* v. *Reynolds* sprang, to the central trade of the few great undertakings which supply war material to the executives of the world, we appear to pass into a different atmosphere from that of *Mitchel* v. *Reynolds*. To apply to such transactions as the present the rule that was invented centuries ago in order to discourage the oppression of English traders, and to prevent monopolies in this country, seems to be the bringing into play of an old-fashioned instrument. In regard, indeed, of all industry, a great change has taken place in England. Railways and steamships, postal communication, telegraphs, and advertisements, have centralized business and altered the entire aspects of local restraints on trade. The ancient rules, however,

still exist; it is desirable that they should be understood to remain in force, but great care is evidently necessary not to force them upon transactions which, if the meaning of the rule is to be observed, ought really to be exceptions.'

And again:

'Can it then be said that a contract by which he consents to the transfer of the business of making guns and ammunition for foreign lands to an English company, with whom he undertakes not to compete so long as the old trade is flourishing in their hands, is against the policy of English law? So to hold would surely be to reduce to an absurdity the law of restraint of trade. I answer the question in the words of Lord Nottingham in the Duke of Norfolk's case: "Pray let us so resolve cases here, that they may stand with the reason of mankind, when they are debated abroad."'

Lord Bowen was a great admirer of Lord Justice Mellish, whom he considered the best arguer he had known at the Bar. Like his great predecessor, Lord Bowen found no difficulty in dealing with Equity appeals, though he would playfully describe himself as a neophyte or a proselyte at the gate. In truth, to a trained mind endowed with legal apprehension, it comes easy to understand and appreciate any system of jurisprudence, even where the details may be unfamiliar. It is, therefore, to be regretted that Lord Bowen did not live regularly to take part in the Judicial Committee in the decision of appeals from our dependencies, in which almost every civilized system of jurisprudence is to be found.

Virgil's polished majesty and perfection of form had great attractions for Bowen's literary taste, and he was tempted to amuse his leisure by attempting the impossible. In the year 1887 he published his translation of the Eclogues and first six books of the Aeneid. In his preface he says that 'a translator of Virgil into English verse finds the road along which he has undertaken to travel strewn with the bleaching bones of unfortunate pilgrims who have preceded him.' Of Dryden's translation he says, 'The silver trumpet has disappeared, and a manly strain is breathed through bronze;' and of Professor Conington's, 'The sweet and solemn majesty of the ancient form is wholly gone.' He selected a metre of his own invention. His lines are hexameters, with the substitution of a single syllable for the final dissyllable, each pair of successive lines rhyming. This is not the time or the place to enter upon a critical judgment of Bowen's own translation. It may be that to endeavour to present Virgil in an English garb is too heroic a task. Many of the lines, particularly in the Eclogues, have a beauty of their own. Reference may, for example, be made to the lament for Daphnis in the Fifth Eclogue.

It is also known to some of his friends that Bowen, like other men of literary genius, from time to time sought expression of his thoughts in poetry. His lyrical verses are graceful and finished, like everything he did, and not seldom touched by the divine spark from Heaven. If Bowen had not been a lawyer, he might have been a poet, as he might have been a good many other things. The writer is permitted to transcribe the following specimen:

> Go, Song, and fall at Silvia's feet, and say,
> Thou art not Love,—but from some frozen sky
> That knows not of Love's name nor of Love's way,
> Hast fluttered idly to her door to die.
> Shake from thy plumes, before thou meet her eye,
> All passion—veil thy gaze, forget thy pain,
> And, if she take thee on her heart to lie,
> Become a thing of beauty, a soft strain
> Filling her dreams with music. Should she deign
> To ask what bird in what enchanted grove
> Taught thee a note so tender, swear again,
> By all thou holdest dear, it was not Love;
> Else will she drive thee, Song, into the night,
> And lost my toil will be, and thy delight.

In 1887 Lord Bowen contributed an article on 'The Administration of the Law' to 'The Reign of Queen Victoria,' edited by Mr. Humphry Ward. The article contains an interesting historical retrospect, in a popular form, of the constitution and procedure of the Courts and the administration of the law at the beginning of the reign, and a full and accurate account of the changes and reforms since made in every department, including, of course, the great changes made by the Judicature Act, 1873, and the amending Acts. It will have a permanent value for every student of legal history in England.

Lord Bowen took a great interest in legal education and the promotion of the study of law, and was for some years an active and useful member of the Council of Legal Education. On the reconstitution of the Council a few years back he desired to extend its work, so as to include all who desired to study law, whether students of the Inns of Court or not. He was also a warm supporter of the movement for creating a great School of Law in London, through the agency of the Inns of Court. Lord Bowen chafed under the restricted conditions by which the work of the Council was confined, and ultimately resigned his seat on it.

Of Charles Bowen as a friend the present writer will not speak in this place. *Sunt lacrimae rerum.* In society his social charm, his courtesy, his playful wit, and the interest of his conversation, endeared him to a large circle. Bowen never wrote or said an unkind or ill-natured thing of anybody and never lost a friend. Not by temperament a man of high spirits, he was sometimes full

of fun, and was not above poking fun from the Bench at some of his old friends at the Bar. His wit was free from sarcasm. It was a polished phrase, a happy simile, or an ingenious turn to a quotation or a story. He once described some ladies, who had been climbing in Switzerland, as solving the problem which had perplexed the minds of the Schoolmen, of how many angels could stand on the point of a needle.

A life of singular beauty and usefulness has been abruptly closed, and the world has suffered the loss of one who combined in so rare a degree nobility and simplicity of character with intellectual power. 'Admiratione te potius quam temporalibus laudibus et, si natura suppeditet, similitudine decoremus. Is verus honor, ea conjunctissimi cujusque pietas.'

HORACE DAVEY.

II. SIR JAMES STEPHEN AS A LEGISLATOR.

SIR James Fitzjames Stephen will be remembered in England rather as a great writer on law than as a great lawyer or as a great judge. In India he will be remembered as a great legislator. His tenure of office there was exceptionally fertile in legislation, especially in codification. It produced the Criminal Procedure Code of 1872, the Evidence Act, and the Contract Act.

The law member who took his seat in the Governor-General's Council at the end of 1869 was fortunate in arriving at a time when a definite task was expected of him, a task which he was specially qualified to undertake. For more than a quarter of a century the comprehensive scheme of Indian legislation which the Directors' despatch of 1834 sketched out, and on which Macaulay and his colleagues laboured, seemed destined to pass into the limbo of unrealized projects. It was partially revived by the appointment, in 1853, of an Indian law commission to work in England. It was still further revived by the reform of the Indian legislature after the Indian Mutiny of 1857, and by the sense of a need for improved administration which arose out of the events of that mutiny. The reformed legislative council enacted a Code of Civil Procedure in 1859, Macaulay's Penal Code in 1860, and a Code of Criminal Procedure in 1861. In the last of these years the Indian Law Commission was reconstituted in England, and numbered among its members such distinguished men as Robert Lowe and the late Lord Justice James. The new Commissioners directed their attention to the codification of substantive law, and sent out to India several drafts of codifying measures. But they were dissatisfied with the slow rate of progress which was made in giving effect to their proposals, and resigned in 1870. Sir Henry Maine had by that time passed into law one of their Bills, the Indian Succession Act, and had introduced two others, the Evidence Bill and the Contract Bill, but had been obliged to leave these as legacies to his successor.

If the Law Commission of 1861 had survived longer, it is doubtful whether their relations to Mr. Fitzjames Stephen would have been altogether harmonious; but there can be no doubt that he sympathized with their impatience of legislative delays. The time of his arrival in India seemed exceptionally propitious to codifying experiments. A quarter of a century ago codification

was more in the air than it is now. Perhaps it would not be disrespectful to the shade of David Dudley Field to suggest that he had not yet been found out. His draft Codes seemed to show the possibility of doing for English law what had been done for Continental law. They had not yet been taken seriously by the legislatures of Western States. They had not yet been dissected by successive generations of Professors. The Indian Law Commissioners of 1861 borrowed from them largely, and not always critically. Many gobbets of undigested Field went out to India in the Contract Bill; too many of them still remain in the Contract Act[1].

And if the time for codification had arrived, so also had the man. Probably no one ever believed more absolutely in the utility and in the practicability of codification than Fitzjames Stephen. The two most potent influences on his mind were those of Bentham and Carlyle. From the former he derived the conviction that all law might, and should, be embodied in a series of brief propositions, logically arranged. By the latter he was inspired with the belief in the strong man as the best maker of laws. He threw himself into his Indian work with characteristic ardour and intensity. He attacked it with grim joy, with fierce delight. His strong will overbore all obstacles. His capacity for hard work was unrivalled. Problems which to the ordinary mind are repulsive from their complexity and technicality possessed for him a singular fascination. The jungle of Indian administrative law was to im a paradise, free from the drawbacks of repose. The two most obvious tasks before him were the Evidence Bill and the Contract Bill. Both of these he revised and passed into law. But there were not only new Codes to enact, there were also existing Codes to amend and recast. He added some new sections to the Penal Code. He took to pieces and with infinite labour re-enacted the Criminal Procedure Code of 1859[2]. One of the charms of codification to his mind was that there was no finality about it. It opened up a vista of unending labour. He would have liked to repeal and re-enact each of the leading Codes at the expiration of moderately short intervals, say of ten or fifteen years. Nor was his legislative activity confined to the great Codes of procedure and substantive law. With the invaluable aid, and mainly through the instrumentality, of Mr. Whitley Stokes, he expurgated and consolidated large portions of the Indian Statute Book. He

[1] [I have found it necessary to comment on some of these in the course of Tagore Lectures, now published, which I delivered at Calcutta last winter.—Ed.]

[2] His select committee on this measure used, as he tells us, to sit for five hours a day, and for five days a week.

supplied a legal foundation for the administrative regulations of the Punjab. He did not shrink from such problems as those involved in Hindu wills and Brahmo Somaj marriages. He helped to build up the system of interstatal law, which regulates the relations of the dominant power to the protected States in India. He took an active part in the executive work of the Governor-General's Council. He wrote a monumental minute on the Indian Judicial system. And he beguiled such intervals of leisure as were afforded by railway journeys and the like by analyzing, in an octavo volume, some of the shibboleths of modern Liberalism. His term of office lasted only half the ordinary span, but he compressed into it enough work for five law members—*οἷοι νῦν βροτοὶ εἰσίν.* He left the Legislative Council breathless and staggering, conscious that they had accomplished unprecedented labours, but not free from some misgivings as to the quality and durability of the work for which they were partially responsible.

The misgivings were not wholly without foundation. Fitzjames Stephen was a Cyclopean builder. He hurled together huge blocks of rough hewn law. It is undeniable that he left behind him some hasty work in the Indian Statute Book, some defective courses of masonry which his successors had to remove and replace.

The period of reaction against excessive legislation which followed his departure from India was not only natural, but necessary and useful. Five years more, and the pendulum swung again in the direction of codification, this time with greater vehemence than was, in his later judgment, desirable. In the minute which he wrote for the Secretary of State on the proposals of the Indian Law Commission which sat in Mr. Whitley Stokes' time, he was sceptical about the expediency or feasibility of schemes for a comprehensive Civil Code, hinted that codification had probably been carried as far, or nearly as far, as sufficed for the practical needs of India, expressed grave doubts about the advisability of attempting to import into India the English law of trusts, and commented with some severity on some of the provisions inserted by the Commissioners in their codifying Bills. One of Mr. Whitley Stokes' last acts was to repeal the Criminal Procedure Code of 1872 and replace it by the Code of 1882. This was perhaps in accordance with his former chief's theories as to the expediency of periodical revision of the Codes, but that chief doubted whether the Code of 1882 was an improvement on its predecessor. We are not always satisfied with the mode in which our friends or pupils carry our theories into practice.

During the years which immediately followed his return from

India Fitzjames Stephen made vigorous endeavours to adapt his Indian legislation to English uses. He drew a Bill for codifying the English law of evidence, which was introduced into Parliament but did not advance beyond a first reading. His draft Code of criminal law and procedure was a more ambitious project and excited great interest in legal circles. After having been introduced into Parliament by Sir John Holker in 1878 it was referred for revision to a Commission consisting of the draftsman and three other judges, who presented their report and draft Code in 1879. The part of it which related to procedure was introduced as a Government measure in 1882, and was the first subject referred to the Grand Committee on Law which was set up experimentally in that year. After a few sittings, in which small progress was made, the Bill was abandoned. From the point of view of technical accuracy some of the provisions of the Bill were open to criticism. It may be that its failure to become law was advantageous rather than detrimental to Sir James Stephen's reputation, for it left his fame to rest on the solid fact of what he had done for India, and on the belief of what he might have done for England but for the ineptitude or perversity of a popular legislature. But it gave a check to the cause of codification in England. It confirmed the indisposition of Parliament to take codifying measures on trust, even when backed by the highest legal authorities. And it confirmed the doubts of experts as to whether the kind of codification which had been found suitable for India would suffice also for England.

The Indian Codes have been made the subject of much uncritical admiration, which ignores their real merits and defects. The Indian Penal Code is far the best of them. In point of form its system of propositions, exceptions and examples constituted a new departure, which amounted to a stroke of genius. In point of substance it will compare favourably with any of the Continental Codes. Yet it could not be enacted for England without extensive alterations. Whenever the work of codifying the English criminal law is again taken seriously in hand, it is doubtful whether the admirable Penal Code which Mr. Justice Wright drew for Jamaica would not afford a better foundation to build upon than either the Indian Penal Code or the Judges' Bill of 1879. Next in order of practical importance to the Penal Code come the two Codes of Procedure, Civil and Criminal, the Evidence Act and the Contract Act[1]. The greater part of the Code of Civil Procedure would, in

[1] The Succession Act applies only to an extremely limited class of persons. It is still difficult to say how far the later Codes associated with Mr. Whitley Stokes's name have been put into practical operation.

this country, bear the more modest name of Rules of Court, and nothing would be gained by substituting it for the existing High Court and County Court Rules. If England could borrow from the Code of Criminal Procedure simple forms of indictment such as have been authorized by Parliament for use in Scotland and at courts-martial, and were proposed by the Criminal Procedure Bills of 1878–82, it would have little else to learn from that Code. The art of legal exposition has made such advances during the last twenty years that English lawyers of this generation could not well be satisfied with the Evidence Act or the Contract Act. With regard to the theory of relevancy embodied in the Evidence Act, the author himself abandoned it with characteristic frankness on being satisfied that its philosophical foundation was unsound. The enactment for England of the codes which have been passed for India would in many respects be a retrograde step. But it would be a mistake to measure these codes by an English standard. Their real merit consists in the fact that they are, on the whole, suitable and sufficient for the needs which they were intended to meet. What was urgently needed for India was a guide for the judge or magistrate who has had no legal training, who derives little or no assistance from his Bar, and who has to work at a distance from a law library. And it is surprising how little suffices for this purpose. For many years the Bombay Presidency got on fairly well with Elphinstone's Code. The simple Punjab Code, of which Sir Richard Temple was the principal author, met the chief requirements of that Province during the early years of British administration. For carrying work of this kind the requisite step further, Fitzjames Stephen was admirably adapted. His Procedure Code supplied a handy set of working rules for the up-country magistrate. His Evidence Act keeps magistrates and their pleaders to the point. The Contract Act, supplemented by a little common sense, will usually put the up-country judge on the right track for deciding the few questions of contract which come before him. Nor is it only to the untrained judge that the Contract Act is of use. For its educational value to the student those who are conversant with Indian Civil Service examinations can with confidence vouch. And it is probably to their educational value that Sir James Stephen's labours for the codification of English law will owe their most enduring fame. If his Criminal Code failed to find a place in the English Statute Book, his digests of English Criminal Law and Criminal Procedure are, and will long remain, the best guides to those subjects which can be obtained either by the English or by the foreign student.

Amongst modern systems of law, English law stands unrivalled

in the vigour and independence of its development, in the wealth of its materials, in the substantial justice and good sense of its principles. But its history has never been written, and in point of form it is still, for the most part, a 'tortuous and ungodly jumble.' These two reproaches Sir James Stephen has done more than any man to remove. He brought his great literary ability to bear on a subject which had been monopolized by the writers of professional text-books. His History of English Criminal Law traces with the pen, not of a compiler or of an annalist, but of a historian, the stages by which the Criminal Law of England has been gradually developed. His Digest maps out in intelligible and orderly fashion the broad results of that development.

The two works stand in intimate relation to and supplement each other, for the History not only describes the growth of the English criminal law in the past, but discusses its features critically with a view to improvement in the future, reviews the points of resemblance to and differences from corresponding and derivative systems in other countries, and examines the bearings of his subject on other kindred ones, legal, moral, metaphysical, social, and political. The History corrects, fills in, and amplifies the 'General Sketch' which had been published nearly thirty years before, and embodies the matured results of knowledge and experience gained during some forty years as a writer, a barrister, a legislator and a judge. It thus marks the culminating point of, and appropriately completes, the labours of a lifetime. It was not in Sir James Stephen's nature to rest and be thankful. Had it been so, he might have been spared to us longer. But when he laid down his pen at the close of the third volume of his History he might justly claim to have accomplished when hardly past his prime the main task which he had laid out for himself at the beginning of his career, and to have supplied what is perhaps the most solid and permanent contribution to the English legal literature of the century. The achievement of such results was due, not to good fortune, but to exceptional literary skill, unflagging industry, and unfaltering tenacity of purpose.

C. P. Ilbert.

THE NATURE AND MEANING OF LAW[1].

Difficulty of the most general ideas in all sciences.

WE find in all human sciences that those ideas which seem to be most simple are really the most difficult to grasp with certainty and express with accuracy. The clearest witness to this fact is borne by the oldest of the sciences, Geometry. No difficulty whatever is found in defining a parabola, or a circle, or a triangle. When we come to a straight line, still more when we speak of a line in general, we feel that it is not so easy to be satisfied. And if it occurs to us to ask the geometer what is the relation of his 'length without breadth' to the sensible phenomena of space, matter, and motion, we shall find ourselves on the verge of problems which are still too deep for all the resources of mathematics and metaphysics together. A philologist will be ready enough with his answer if we question him on the Greek or the Slavonic verb. If we ask him what is a verb in general we may have to wait a little, and if we ask him to account for language itself we shall find ourselves again in a region of doubt and contention. It is not surprising, then, that the student approaching the science of law should find the formal definiteness of its ideas to vary inversely with their generality. No tolerably prepared candidate in an English or American law school will hesitate to define an estate in fee simple: on the other hand, the greater have been a lawyer's opportunities of knowledge, and the more time he has given to the study of legal principles, the greater will be his hesitation before the apparently simple question, What is Law?

No complete theory of law without complete theory of society: but approximate generalization needful.

In fact, a complete answer to this question is not possible unless and until we have a complete theory of the nature and functions of human society. Yet we cannot afford to wait for such a theory, for we are born into a social and political world from which we cannot escape. Rule, custom, and law beset us on every side. Even if at this or that point we go about to defy them we cannot ignore them; and the possible points of revolt, as reflection will show, are really but few even in such kinds of life as are called lawless. We have to abide the law whether we will or no; and to abide it, on the whole, in obedience rather than in resistance. The French Revolution seemed, and in many respects was, a fundamental catastrophe: but it appeared, as things resumed a settled

[1] The introductory chapter of a work in preparation, founded on lectures delivered at Oxford.

frame, that a large proportion of French institutions, traditions of policy, and positive laws too, had survived the Revolution. If then we are to obey with understanding, we must endeavour to understand so much as is needful for the purpose in hand, relying on the most approximately certain data that we can command.

Society cannot exist without rules of social order.

Man cannot live alone; the individual cannot do without the family; and although family groups can be conceived as independent and self-sufficing, the family has from very early times been in like manner part of a larger society, whether it be a clan, a tribe, or a nation, with which it is bound up. No society can continue without some uniform practice and habits of life. Individual impulse has to be subordinated to this need; and this subordination is a never ending process. Hence there must be rule and constraint; and not the less so because, in one sense, the aims of the society and of the individual coincide. On the whole and in the long run the interest of the individual is that society should exist. This is obviously true; but it is far from obviously true, indeed it seems not to be true, that his interest coincides always or everywhere with the interest of the society whereof he is a member, either as it really is or as it seems to be to those who conduct its affairs. Society comes into existence because its members could not live without it; but in continuing to exist it forthwith aims at an ideal, and that ideal is for the society and not for the individual member. The need for internal order is as constant as the need for external defence. No society can be stable in which either of these requirements substantially fails to be provided for; and internal order means a great deal more than the protection of individuals against wilful revolt or wanton lawlessness. Express and definite forms of association are required for the fulfilment of these purposes and the maintenance of a perpetual succession from one generation of men living in society to another. When established, these forms embody and preserve the individual character of every self-maintaining community. In the sum of such forms, as expressing and determining in each case the conditions of collective life and well-being, we have the State. We say well-being with reference to the ideal and not with reference to the actual success attained. Some States have secured the well-being of their members much better than others, and the less successful ones may be called relatively bad, or in some cases even very bad. Still an inferior social organization, though measurably worse than other and better forms, is immeasurably better than none.

The State needs rules

Further, if the State is to be permanent, we need more than the existence of some kind of social rule. We conceive many rules,

binding on citizens as such.

the common and fundamental ones in matters of right and wrong, for example, to be binding on men simply as rational and social beings, without regard to any positive institutions. But this will not suffice for the State, which is an association for living together in definite ways. There must be rules binding the members of the State not merely as human or rational, but as members of that State; and this is not affected by the fact that to some extent, perhaps to a large extent, such rules include the matter of universal or more highly general duties which are of antecedent and independent force. Wherever any considerable degree of civilization has been reached, we find means appointed by public authority for declaring, administering, and enforcing rules of this kind. In dealing with these rules, as with all others, both the persons administering them and those whose interests are affected have to attend not only to the rules or principles themselves, but to the conditions under which they become applicable, the mode in which they are applied, and the consequences of their application. The sum of such rules as existing in a given commonwealth, under whatever particular forms, is what in common speech we understand by law; the publicly appointed or recognized bodies which administer such rules are courts of justice. By justice, in this usage, we mean not only the doing of right, or the duty thereof, as between man and man, but the purpose and endeavour of the State to cause right to be done.

Such rules make up law.

Law not necessarily professional or official.

In modern times and in civilized countries we find the work of courts of justice carried on by permanent officers; it is a special kind of work, and the knowledge of law is a special kind of knowledge which can be acquired only by a professional training. Law has developed an art and a science of its own just as much as medicine. These conditions are now so usual that we might easily think them necessary; but they are not so. Law and legal justice can exist without a profession of judges or advocates; and where a legal profession exists, its divisions, and the relation of its branches to one another, have varied and still vary to a wide extent in highly civilized countries and down to our own times. Thus at Rome under the later Republic and the early Empire there was a class of highly skilled advocates, and under the Empire there was something like a Ministry of Justice, but for a long time there was nothing answering to the ordinary judicial establishments of modern States. In England it does not appear that before the Norman Conquest there was any distinct legal profession at all, and in the succeeding Anglo-Norman period there were professional or at any rate skilled judges, but no professional advocates. In Iceland, about the same time, there was a highly technical system

of law[1]; courts were regularly held, and their constitution was the subject of minute rules; and there were generally two or three persons to be found who had the reputation of being more skilled in law than their neighbours. Yet with all this there were neither judges nor counsellors in our modern sense. It is the administration of justice with some sort of regularity that marks the existence of law, not the completeness of the rules administered, nor any official character of those who administer them.

Custom.

There has been much discussion about the relation of custom to law. Custom, except in distinctly technical applications which are really part of a developed legal system, seems to have no primary meaning beyond that of a rule or habit of action which is in fact used or observed (we may perhaps add, consciously used or observed) by some body or class of persons, or even by one person. It was the 'custom' of Hamlet's father to sleep in his orchard of the afternoon. In the Morte D'Arthur we constantly read of a 'custom' peculiar to this or that knight; for example Sir Dinadan had such a custom that he loved every good knight, and Sir Galahalt 'the hault prince' had a custom that he would eat no fish. And it is still correct, though less common than it was, to use the word in this manner. Often custom is the usage of some class or body less extensive than the State, such as the inhabitants of a city, the members of a trade. But it can have a scope much wider than the limits of the State. The Church, which of course is not bounded by any State, and in the medieval view could not be, had her own customs and refused to let any secular power pass judgment on their validity. No constant relation to law or judicial authority can be predicated of custom. It may or may not be treated as part of the law. Much law purports to be founded upon custom, and much custom has certainly become law. The extent to which this has happened, and the manner in which it has been brought about, are matters of history in the legal system which each particular State has developed or adopted. We shall have to return to this when we consider the sources and forms of the law of England. So far the word 'custom' may be said to suggest the notion of potential or incipient legality. But on the other hand much custom is quite outside the usual sphere of law. Still the word has a certain ethical force tending to confine its use to those habits which the persons practising them recognize as in some way binding. Such are, to take a conspicuous example, customs of tribes and castes which have

[1] There is quite enough to support this statement apart from the elaborate pleadings set out in the present text of the Njáls Saga, which are believed to be of much later introduction.

a religious character. 'Customary' carries more weight, though it may be only a little more, than 'usual[1].' In the weakest case we mean by custom a little more than habit, for one may have habits of an automatic or mechanical kind of which one is barely or not at all conscious. It is hardly needful to add that a great deal of law, at any rate of modern law, has not any visible relation to pre-existing custom.

'Practice,' in the modern usage of the legal profession, signifies a particular kind of custom, namely that by which a court of justice regulates the course of its own proceedings.

Moral law, natural law or law of nature.

We have used the word Law, so far, without any epithet, the sense in which we have used it being that which is commonly understood where nothing in the context requires a different one. But the word has other usages more or less analogous to the principal meaning. Moral law is the sum of the rules of conduct which we conceive to be binding on human beings, generally or with regard to the circumstances of a particular society, so far forth as they are capable of discerning between right and wrong; but it may also mean the rules to which the members of a particular society are actually expected, by the feelings and opinions prevalent in that society, to conform. Sometimes the distinction between actual and ideal rules of conduct is marked by speaking of moral rules, or of 'positive morality,' when we mean the rules accepted in fact at given times and places, but of 'natural law' or 'law of nature' when we mean such rules as are universally accepted, or in our opinion ought so to be. Positive morality may be, and in many times and places is known to have been or still to be, contrary to universal morality or natural law. The supposed duty of a Hindu widow to burn herself with her husband's corpse is a striking example.

Law of nations.

The rules observed, or generally expected so to be, by the governments of civilized independent States in their dealings with one another and with one another's subjects are called the Law of Nations, or International Law. We are not called upon to consider here whether they are more nearly analogous to the law administered by courts of justice within a State, or to purely moral rules, or to those customs and observances in an imperfectly organized society which have not fully acquired the character of law, but are on the way to become law. This last mentioned opinion is my own; but I do not deem this a fit place for dwelling upon it. The whole matter is much disputed, and cannot be

[1] See Littré, s.v. *Coutume.* Perhaps this tendency is more marked in French than in English.

effectually discussed without assuming a good deal both of law and of the history of law to be known.

Extended use of 'law' for particular social rules.

Bodies of rule or custom existing in a limited section of a community, and enforced by the opinion of that section within itself, are often called laws: as when we speak of the laws of honour, or the laws of etiquette. It is to be remembered that in medieval Europe the 'law of arms' was for the persons affected by it a true and perfect law, having its courts, judges, and compulsory sentences. In modern times this use of the word seems to be avowedly metaphorical. Sometimes we hear of 'the code of honour,' which cannot be justified even as a metaphorical licence: a code, as we shall see later, being essentially a collection of articulate and definite rules or statements, and generally purporting to proceed from a definite authority.

'Law' in the concrete as an *enacted* rule.

In English we use the word Law in a concrete sense to mean any particular rule, having the nature of law in the abstract sense, which is expressly prescribed by the supreme power in the State, or by some person or body having authority for that purpose though not generally supreme. A law, in this sense, is the exercise of a creative or at least formative authority and discretion; the power that made it might conceivably have chosen to make it otherwise. The rule is such because a definite authority has made it so; it lay in the lawgiver's hand what it should be. There is an element, at least, of origination. Application of existing principles, however carefully worked out, and however important it may be in its results, is not within the meaning. Therefore, although declarations of legal principles, or interpretations of express laws, by courts of justice may well be said to form part of the law, and so to be law in the abstract sense, we cannot say of any such declaration or interpretation that it is 'a law[1].' When we are using the term in this concrete sense it is not only correct enough for ordinary political purposes, but correct without qualification, to say that 'Laws are general rules made by the State for its subjects[2].' The plural 'laws' is ambiguous, and the context must determine in which sense it is used. It may cover both meanings, as when we speak of 'the laws of England' as including the whole body of English law, both what has been enacted by Parliament and what is derived from other sources. It is quite possible for the administration and development of 'law' and the production of concrete 'laws' to be in the

[1] When some part of the general law has been designated by the context, it may afterwards be referred to as 'a law,' i. e. a portion of law, without reference to its being an express enactment or not, as if we say, 'The law of slander by spoken words is not a reasonable law.'

[2] Raleigh, Elementary Politics, ch. v, *init.*

same hands to a greater or less extent. Thus a decision of an English Superior Court is law unless and until reversed or overruled by a higher Court; a rule of procedure made by the Judges under the powers conferred on them by the Judicature Acts is *a* law, though English-speaking lawyers do not commonly call it so, because it is more convenient to use the appropriate term 'Rule of Court.' In like manner an Act of the Imperial Parliament, or an Order in Council, or an Ordinance made by the Legislature of a Crown Colony, is a law, though almost always called by the more specific name.

'Laws' in extended sense of particular rules in non-judicial matters.

This concrete usage is extended to all sorts of express rules made and recorded for the guidance of human action in all sorts of matters both serious and otherwise. Clubs and societies have their laws; there are laws of cricket and laws of whist. As might be expected, the distinction between the concrete and the abstract sense is not always exactly observed in popular usage. One might say without impropriety: 'It is *a law* of journalism that an editor shall not disclose the authorship of an unsigned article without the writer's consent,' although 'rule' or 'custom' would be more accurate.

English 'law' includes 'ius' and 'lex.'

It is proper to note that the ambiguity of the word *law* seems peculiar to English among the chief Western languages. Law in the abstract, the sum of rules of justice administered in a State and by its authority, is *ius* in Latin, *droit* in French, *diritto* in Italian, *Recht* in German. For the express rule laid down by an originating authority these languages have respectively the quite distinct words *lex*, *loi*[1], *legge* (the French and Italian words being modern forms of the Latin one), *Gesetz*. Thus an Englishman tends, consciously or not, to regard enacted law as the typical form; it is hard for him not to identify laws (as the plural of 'a law') with Law. Frenchmen and Germans, on the other hand, are more likely to regard *loi* or *Gesetz* as merely a particular form of *droit* or *Recht*, and not necessarily the most important form.

'Ius.' &c. include 'law' and 'right.'

On the other hand, these Latin and other names for law in the abstract (*ius*, *droit*, *diritto*, *Recht*) correspond also to our distinct English word *right* in its substantive use. This leads to verbal ambiguities, and gives occasion for confusions of thought, which are perhaps not less inconvenient than any consequences of *law* having to stand for both *ius* and *lex* in our language.

[1] In some French phrases *droit* and *loi* run into one another, e. g. 'homme de loi.' 'Droit naturel' and 'loi naturelle,' 'droit des gens' and 'loi des nations,' are convertible terms. The like laxity as between *lex*, *leges*, and *ius* is common in medieval Latin. In German, so far as I know, *Recht* and *Gesetz* are never interchangeable. *Gesetz* means a rule which is in fact, not only by right or wrong philosophic construction, 'set' by a definite authority, and even in figurative uses this primary meaning is not lost sight of.

Extended use of 'law' in scientific terminology.

From the concrete use of the word *law* we have by extension the term 'law' or 'laws of nature' in the language of natural philosophy, or science as it is now commonly called, though in truth it is but one kind of science. Here the word has a wholly distinct meaning from those we have hitherto mentioned. It signifies any verified uniformity of phenomena which is capable of being expressed in a definite statement, and by 'the laws of nature' we mean the sum of such uniformities known or knowable, in other words the uniformity of nature as a whole. Doubtless this language originally implied a belief that uniformity in nature, whether general or particular, is due to will and design in some way analogous to those of human princes and rulers; but it has long ceased to have any such implication as a matter of necessity or even of common understanding. No one thinks of Grimm's Law, or other 'laws of phonetics,' as anything but compendious expressions of more or less generally observed facts in human speech, or in particular groups of languages. Further, this meaning has been carried back into the region of moral and political science, as when we speak of the laws of political economy or history. We may even say, if we please, though it would hardly be elegant, that the laws of history are exemplified in the history of law, thus using the word in the primary and the derivative sense in the same sentence. Here the term has quite lost its ethical associations; in fact those who insist most strongly upon the ethical element of law in its primary sense are perhaps those who are most likely to object to this usage. Such a phrase as laws of political economy, laws of history, laws of statistics, has no dependence whatever on any conception of a tribunal or a lawgiver, or of doing justice. It signifies only the normal results, as collected by observation or deduced by reasoning, of conditions, and (where human action is concerned) habits and motives, assumed to exist and to have effect. Whether we like those results or not; whether and to what extent the conditions are within the control of deliberate human action; and in what direction, if at all, we shall endeavour to modify the conditions or counteract the results, may be matters deserving to be most carefully weighed: but they belong to a different order of considerations. Physicists have studied what are called the laws of electricity till it has become possible to light our houses with electric lamps. The occupier of a house so lighted can turn those laws to account whenever he pleases, and for so long as he pleases, provided that everything is in order, and in that sense he can control them. But his reasons for wanting or not wanting to light up a particular room at this or that hour have nothing to do with electrical science.

The fact that a stone lies on the ground is an example of the 'law of gravity.' My desire to pick it up, followed by the act of picking it up, does not affect the 'law,' in other words that particular aspect of the uniformity of nature, in any way: it only varies the example. A well-to-do man going abroad lets his house to a friend at a nominal rent: the 'laws of political economy' have nothing to say to this: the transaction is not such an one as economists contemplate. In short, the 'laws of nature' are, for the lawyer and moralist, matters not of law at all in their sense, but of pure fact. And this applies equally to the so-called laws of human action in so far as human action is a subject of scientific observation.

Law in its compulsory aspect: Sanctions.

We may now leave aside the secondary and derivative meanings of 'law' or 'laws,' and attend only to such rules as are recognized and administered in a commonwealth, and under its authority, as binding on its members. Thus far we have said nothing about the enforcement of the rules. In a modern civilized State it is well understood that, if resistance is made, the power of the State, or such part thereof as may be needful for the purpose, will be put forth to overcome it. Only the commonest knowledge of affairs and events, as they occur day by day, is required to assure us that the commission of acts forbidden by law, or disobedience to the orders of a court of justice, is likely to have unpleasant consequences in various degrees and kinds, according to the nature of the case and the system of law and government existing at the time and place, and that much work and thought are spent on behalf of the State in making that likelihood approach as near as may be to certainty. Common knowledge no less informs us, it is true, that the public servants of even the most highly organized State do not attain constant or uniform success in this endeavour. Some offenders escape and some laws are disregarded. But the State is, on the whole, prepared to compel its members to obey the law, and does, on the whole, exercise an effective compulsion; that is to say, it will and can make compliance with the law preferable to disobedience for most men on most occasions, by the application of fitting means through its officers appointed for that purpose. If this much cannot be affirmed in a given society at a given time (say a minor South American republic when a revolution is at its height), that society is in a condition of political anarchy for the time being, or at least the functions of the State are suspended. In fact we find the will and power to enforce the law by public authority to be stronger in proportion as the commonwealth is more settled, more prosperous, and more refined. 'The magistrate beareth not the sword in vain.' Hence it is

natural for men living in a civilized State to regard this public will and power of causing the law to be observed as belonging to the very essence of law. The appointed consequences of disobedience, the *sanctions* of law as they are commonly called, seem to be not only a normal element of civilized law, but a necessary constituent. Law without a sanction, and that sanction in the hands of the State, can, in this way of thinking, easily appear like a contradiction in terms.

Enforcement of law by the State is relatively modern.

Any such view, however, will be found hard to reconcile with the witness of history. For we find, if we look away from such elaborated systems as those of the later Roman empire and of modern Western governments, that not only law, but law with a good deal of formality, has existed before the State had any adequate means of compelling its observance, and indeed before there was any regular process of enforcement at all. We have already vouched the Icelandic Sagas to show that law can do without a legal profession: we may vouch them to show no less clearly that it can do without a formal sanction. More than this, we find preserved among the antiquities of legal systems, and notably in archaic forms and solemnities, considerable traces of a time when the jurisdiction of courts arose only from the voluntary submission of the parties: and this not only as between subject and subject, but as between a subject and the State[1]. We need not doubt that effectual motives for submission could be brought, sooner or later, to bear on unwilling subjects. The man who did not submit himself to law could not claim the benefit of the law; there was no reason why every man's hand should not be against him. Outlawry, now all but obsolete even in name, was the formal expression of the archaic social rules by which law was gradually made supreme. Again, archaic procedure shows us a period in which a suitor may obtain judgment, but must execute the judgment for himself. The most the State will do for him is to come eventually to his aid if the adversary or the adversary's friends continue to deny him right. In the meantime private force holds the ground, but the winning suitor's private force is lawful and the loser's is unlawful.

At this stage the State can hardly be said to provide any sanction of its own; it only gives moral support and coherence to sanctions already existing in a vague form. Conversely, one of the first signs of the reviving power and solidity of the State in the early Middle Ages was the jealous restriction of private force, even when the claimant who sought his ends by might had full right on his

[1] The history of English criminal procedure affords at least one striking illustration: but I purposely avoid a digression.

side. *Iniuste* and *sine iudicio* became convertible terms. It is wrong to do oneself right without judgment and public authority.

Informal sanctions common to law and morality.

In one sense we may well enough say that there is no law without a sanction. For a rule of law must at least be a rule conceived as binding; and a rule is not binding when any one to whom it applies is free to observe it or not as he thinks fit. To conceive of any part of human conduct as subject to law is to conceive that the actor's freedom has bounds which he oversteps at his peril. One or more courses of action may be right or allowable; at least one must be wrong. Now what is felt to be wrong is felt to call for redress. This may be direct or indirect, swift or tardy; but in the mere sense and apprehension of redress to come, however remote and improbable it may seem, and however uncertain the manner of it may be, we have already some kind of sanction, and not the less a sanction because its effect may be precarious. All this applies to moral no less than to legal rules. Taken thus largely, there are sanctions of infinite degrees from obscure monitions of conscience to general and open reprobation, or even acts of violence prompted by the indignation of one's fellow-men[1]; and, if we pass from the moral and social to the legal sphere, from some small expense or disadvantage in the conduct of a lawsuit, or some small penalty for delay in performing a public duty, to the severest penalties of criminal jurisdiction. But in a modern State the sanction of law means both for lawful men and for evil-doers something much more definite. It means nothing less than the constant willingness and readiness of the State, in the persons of its magistrates and officers, to use its power in causing justice to be done; and this in respect not only of the main duties enforceable by law, but of an immense number of incidental and at first sight arbitrary rules and conditions.

Law and the 'will of the State.'

In short the conception of law, many of its ideas, and much even of its form, are prior in history to the official intervention of the State, save in the last resort, to maintain law. True it is that in modern States law tends more and more to become identified with the will of the State as expressed by the authorities intrusted with the direction of the common power. But to regard law as merely that which the State wills or commands is eminently the mistake of a layman, as one of the greatest modern jurists has hinted[2]; and, we may add, of a layman who has not considered the difference between modern and archaic societies, or the political and social foundations of law. For most practical purposes the citizens of

[1] Such acts may or may not be justifiable, and the rule enforced may or may not be itself right from the point of view of universal morality. This does not concern us here.

[2] Ihering, Geist des römischen Rechtes, i. 37 (ed. 1878).

a State, and to a considerable extent, though not altogether, lawyers and magistrates also, have not to concern themselves with thinking what those foundations are. Their business is to learn and know, so far as needful for their affairs, what rules the State does undertake to enforce and administer, whatever the real or professed reasons for those rules may be. Moreover criminal law, which is eminently imperative, is that branch of law which appeals most to the popular imagination, and fills the largest place in popular notions of legal justice. Again the unexampled activity of the legislative power in modern States has largely increased the sphere of express enactment. All these causes have made it possible and even plausible to regard law not only as being embodied in the commands of a political sovereign, but as consisting of such commands and being nothing else. They have not altered the fundamental facts of human society; and the merely imperative theory of legal institutions remains as one-sided and unphilosophical as it was before. Law is enforced by the State because it is law; it is not law merely because the State enforces it. But the further pursuit of this subject seems to belong to the philosophy of Politics rather than of Law.

FREDERICK POLLOCK.

AFTER-ACQUIRED PROPERTY IN BANKRUPTCY.

IN the 54th section of the Bankruptcy Act, 1883, it is written, 'Immediately on a debtor being adjudged bankrupt the property of the bankrupt shall vest in the trustee.' By section 44 of the same statute it is laid down that the property of the bankrupt comprises *inter alia* 'all such property as may belong to or be vested in the bankrupt at the commencement of the bankruptcy or may be acquired by or devolve on him before his discharge;' and according to section 168, 'Property includes money, goods, things in action, land, and every description of property whether real or personal, and whether situate in England or elsewhere; also obligations, easements, and every description of estate, interest, and profit present or future, vested or contingent, arising out of or incident to property as above defined.' The wording is in effect only a repetition of the provisions on the subject contained in the Bankruptcy Act, 1869.

If read strictly the enactment declares that an undischarged bankrupt's future property—property which he may have no shadow of right to or interest in for many years to come—is vested in the trustee long before he acquires it, or, by way of example, if he (say ten years after the commencement of the bankruptcy) purchases or acquires by gift, descent, or otherwise a house with ancient lights, he having no right, title, or interest therein until the date of such purchase or acquisition, his interest in the easement relating to such lights was vested in the trustee at the date of such trustee's appointment ten years previously.

Such a proposition sounds absurd, but nevertheless by the light of the history of these clauses an intelligible and reasonable interpretation can be given to them.

Under the Bankruptcy law as it existed in the last century and thence up to 6 Geo. IV, when a man became bankrupt the Commissioners in Bankruptcy, by virtue of statutory powers, assigned by deed to the assignees the personal estate of the bankrupt, and by another deed indented and enrolled conveyed to the assignees his legal estate. The assignment of the personal estate was held to pass to the assignees all that the bankrupt was then possessed of and a right to claim, take, and recover all that he might at any time afterwards during the bankruptcy become

possessed of, with certain exceptions, e.g. his future earnings. That it did not give to the assignees the sole and absolute title to such after-acquired personal property was fully recognized. In *Ashley* v. *Kell*, 2 Strange 1207, it was held that notwithstanding the deed of assignment under which the future effects of a bankrupt, against whom two commissions had issued, were liable to be seized for the benefit of creditors, yet the bankrupt had in the meantime such a property in them as enabled him to transact and sell to a bona fide purchaser. By several decisions, principally between the years 1790 and 1820, it was conclusively established that an undischarged bankrupt might recover goods, sue for money, for damages for breach of contract, and even damages for trespass to lands, where the questions related to after-acquired property, if the assignees did not intervene.

In order to justify their decisions the Judges based them at first on the possibility of the subject-matter of the actions being the produce of or being blended with the work and labour of the bankrupt, to which the assignees could lay no claim; but they subsequently took broader grounds, and laid down the proposition that, as to personal property (real property not being then the subject of decision for reasons that will be afterwards stated), the bankrupt had a special property therein which justified him in proceeding in his own name; and that though when the assignees laid a claim thereto he was ousted from his rights, yet until they did so it did not lie in the mouth of any other person to plead the bankruptcy. The grounds for the decisions were stated in *Webb* v. *Fox*, 7 T. R. 391, 4 R. R. 472 to be 'sound policy and convenience to prevent a scramble for goods if the assignee does not choose to dispute the question.'

In *Fowler* v. *Down*, 1 B. & P. 44, the Court went a trifle further in defining the rights of the bankrupt. An order for the delivery of goods in the hands of a third person had been given to an uncertificated bankrupt, in satisfaction of a debt which had accrued subsequently to his bankruptcy. For the recovery of such goods he brought his action of trover, in defence to which the bankruptcy was pleaded. In giving judgment in favour of the bankrupt Eyre C.J. said, 'This narrow ground that the bankrupt has a right against everybody but his assignees, which is maintained by the authorities, is sufficient to support this verdict. This is not the case of special property, but is entire property, though defeasible or, so to speak, liable to be divested;' and Buller J. said, 'He (the bankrupt) has a defeasible title which none but the assignees can defeat. He is like an alien, who may purchase lands and maintain an action if the Crown does not interpose.'

In these old cases it does not seem to have been suggested by the Judges that notice of the bankruptcy was any answer to the rights of the bankrupt. On the contrary, the existence of the bankruptcy was pleaded as a defence, but without success.

I venture to suggest that the decision in *Fowler* v. *Down* was based on the right grounds, that an assignment of that which has no existence at the time operates at the best only as the creation of an equitable right in the assignee to the property purported to be assigned when it shall be ascertained, and that the true effect of the assignment of the Commissioners, so far as it was supposed to include after-acquired property, was only to give to the assignees a right to reduce the same into possession when it came into existence, leaving however the entire property in the bankrupt until such right was claimed.

I have stated that the position of after-acquired real estate was not questioned at the date of these old decisions in the same way as the right to personal estate was. The reason was this. Such future real estate was not held to have passed under the original deed relating to real property, but it had to be conveyed by a new deed to the assignees after the bankrupt had acquired a title to it. As stated in *Carleton* v. *Leighton*, 3 Mer. 672, 'Until the creditors chose to take the benefit of this property by such assignment it remained in the bankrupt both in Law and in Equity.'

So the law stood until the statute 6 Geo. IV, c. 16 was passed, repealing prior Acts of Parliament on the subject. By this statute, for the purpose of avoiding the trouble of getting a fresh assignment whenever real property was acquired by an undischarged bankrupt, and of giving the assignees a similar right or title thereto to that which they previously had in relation to after-acquired personal property, the Commissioners were directed to assign to the assignees all the present and future personal estate of the bankrupt, and also by deed indented and enrolled to convey to such assignees all lands and tenements except copyholds (for which special provisions were made) 'to which any bankrupt is entitled,' and all such lands, &c. 'as he shall purchase or shall descend, be devised, revert to, or come to such bankrupt before he shall have obtained his certificate;' and it was also provided that under certain circumstances a certificate of conformity might be given, but that if he should become bankrupt a second time and should obtain another certificate, then unless his estate should produce 15*s.* in the pound for his creditors in the second bankruptcy, such second certificate should only protect his person, and that his future estate and effects should vest in his assignees, who should be entitled to seize the same.

It will be noticed that, except for the distinction in the modes of conveyance of real and personal property under this Act, there was nothing to differentiate the one from the other, and that the right to future estates in realty passed to the trustees as fully as after-acquired personalty. And also that although for the purpose of specifying the conveyances there are distinct and several references to real and personal properties in the earlier provisions, they are dealt with conjointly in the later one in which the word 'vest'—as I believe for the first time—appears in relation to the subject. The conclusion being, as I submit, that the Legislature did not intend to put any real difference between the right of the assignees to these kinds of property.

In the case of *ex parte Butler, re Bakewell*, 2 M. D. & D. 731, an assignee under a second commission, where the bankrupt had obtained his certificate but 15*s*. in the pound had not been paid to his creditors, petitioned that a subsequent fiat might be annulled and the assignee appointed thereunder ordered to account for property received by him. The question no doubt did not affect the actual dealings by the bankrupt with his property, but it did affect the rights of creditors and was dealt with on the principles enunciated in *Troughton* v. *Gitley*, Ambler 630, which was decided on the ground that if a man, having a lien, stands by and lets another make a new security, he shall be postponed; but it is useful in showing that the Court of Bankruptcy put no difference between real and personal property, and moreover is *ad rem* if it be admitted that a purchaser for value stands in at least as good a position as an ordinary creditor. In that case the bankrupt had become possessed of real property as well as personal. In giving judgment Sir John Cross said that the same principles applied to real property as to personal, and he decided that the whole property real and personal then existing, which the bankrupt had acquired since his second bankruptcy, was applicable in the first place towards the payment of the debts in the third bankruptcy.

A case of considerable importance in relation to this subject also decided under the statute of Geo. IV was *Herbert* v. *Sayer*, 5 Q. B. 965, where a man who was bankrupt for the second time had obtained his certificate, but his estate had not realized 15*s*. in the pound. He sued on a bill of exchange endorsed to him since the date of his certificate, and it was objected that the property was in the assignees in his second bankruptcy. The judgment of the Exchequer Chamber reversing the decision of the Court below was in his favour. It was laid down that whatever right an uncertificated bankrupt had before the statute of Geo. IV in after-acquired

property, an uncertificated bankrupt after that statute had the same; and the judgment proceeded thus:

'All future property and contracts vest in the assignees, by the words of stat. 6 Geo. IV, c. 16, ss. 63, 127, and by the construction put by the Courts on the words of the older statutes. But there must be property in the bankrupt, or contracts with him, before such property or contracts can vest in the assignees. The effect of the statutory enactments may be, either to transfer immediately such property or contracts from the bankrupt to the assignees, vesting the property or contracts in the bankrupt for an instant only, or to give the assignees the beneficial interest and to make the bankrupt acquire property or contract for their benefit only, in the nature of an agent. The cases accord with the latter construction of the statute; and it is most consistent with convenience; for otherwise there would be no protection to persons dealing with an uncertificated bankrupt. Not only would they acquire no title by purchases from him, but payments for such purchases, and for all other debts due to the uncertificated bankrupt, would be invalidated. The Legislature, by several statutes, have protected all payments by, and to, and all dealings and transactions with, the bankrupt bona fide made or entered into without notice of the Act of Bankruptcy before the fiat; but there is no provision by the statute law for such payments, dealings, or transactions after the fiat; and the only way by which they can be rendered valid, and great confusion, inconvenience, and hardship prevented, is by adopting the latter construction, and holding that the bankrupt acquires property, and contracts for the assignees, who may, whenever they please, disaffirm his act, but until they do so his acts are valid.'

As will be seen hereafter this reasoning was adopted by Fry L.J. in *Cohen* v. *Mitchell*, with the exception that he has substituted the word 'intervene' for the words 'disaffirm his acts.' May it not be suggested that there is a third alternative, viz. that enunciated in *Fowler* v. *Down*, 'that it is not a special property which the bankrupt has in his after-acquired property, but an absolute property liable to be divested'? This suggestion is supported by a point which ought not to be overlooked in the judgment in *Herbert* v. *Sayer*, and that is, the obvious intention of the Court to place dealings with the bankrupt in relation to his after-acquired property with persons who take bona fide and for value, though with notice of the bankruptcy, on a par with dealings by him as to his previously-acquired property under the Protected Transactions Clauses with persons who take bona fide and for value without notice of an act of bankruptcy. In each case, as I submit, the transaction of the bankrupt bars the vesting in the trustee.

It is in fact impossible to read this and the cases previously decided on the point without being struck with the fact that the

Judges fully recognized the hardships that would result from not supporting the right of the bankrupt to make title to his after-acquired property if his assignees did not intervene, and with the ingenuity that they displayed in trying to find some legal excuse for what they were doing. Prior to the decision last above quoted, but not affecting it, the statute 1 & 2 Will. IV, c. 56 was passed. By this statute it was provided that all the personal estate and effects of a bankrupt 'which by the laws now in force may be assigned by Commissioners,' 'shall become absolutely vested in and transferred to the assignees or assignee for the time being, by virtue of their appointment without any deed of assignment for that purpose, *as fully to all intents as if such estate and effects were assigned by deed* to such assignees and the survivor of them;' and also that 'all such present and future real estate of such bankrupt' within the possessions of the Crown, as by the statute of Geo. IV 'is directed to be conveyed by the Commissioners to the assignees, shall vest in such bankrupt's assignee or assignees for the time being, by virtue of his or their appointment, *without any deed of conveyance* for that purpose.' Here there was clearly no intention to do more than simply to substitute the statutory title for the conveyance, leaving the rights of all parties exactly as they were before. Whatever had been previously assigned or conveyed was now to vest in the assignees without the form of a deed.

Before passing on I may be permitted to remark that the interpretation put by the Courts on the statutes showed that there were two different kinds of vesting, one applicable to property existing at the time of the bankruptcy, and the other applying to after-acquired property, that the vesting by the statute was the same as might be made by deed executed at the date of the bankruptcy, and that there is nothing to indicate that the trustee got a better title to after-acquired realty than he did to after-acquired personalty. The analogy attempted to be drawn by Tyndal C.J. between the protection given by statute to certain transactions prior to the fiat and those to which the judgment in *Herbert* v. *Sayer* refers, points the same way. What are called the Protected Transactions Clauses apply equally to real and personal property.

The Legislature must be taken to have had all the prior decisions and their effects in mind when the Bankrupt Law Consolidation Act, 1849, was passed. By that Act all present and future personal estate of a bankrupt was to become absolutely vested in the assignees for the time being by virtue of their appointment, and all present real estate (except copyholds), 'and all such lands, tenements, and hereditaments as he shall purchase, or shall descend, be devised, revert to, or come to' the bankrupt before certificate, shall become

absolutely vested in the assignees for the time being by virtue of their appointment, *without any deed or conveyance for that purpose.*

It has never been suggested that this enactment intended to make any alteration in the old law on the present point; and since 1849 the only statutes that need be referred to are those which I have noticed in the commencement of this paper, viz. the Acts of 1869 and of 1883, which express the previous law. The words adopted by the first of these statutes and copied by the latter, whereby the future property is made to vest immediately, I think must be taken to mean only that when a trustee is appointed he shall be immediately clothed with all such rights and powers of claiming and taking when possible the property of the bankrupt, as the assignees had under the Acts existing prior to 1869.

The continual reference up to and inclusive of the statute of 1849, of the assignees taking without any deed of assignment or conveyance, seems to indicate that they were to take by statute only what an assignment or conveyance would have given them if made at the date of their appointment; and that the word 'vest' must be taken to have a correlative meaning to the word 'conveyance.'

That this word 'vest' does not necessarily mean all that has sometimes been ascribed to it is, I think, shown by the case of *Hinde* v. *Chorlton*, L. R. 2 C. P. 104. Under a local Act certain trustees were appointed and empowered to pull down and rebuild a church and to erect pews therein. All the materials for the church and pews were *vested* in the trustees. They had power to let or sell any pew which had not been appropriated in a certain manner, and on such sale to execute a conveyance, 'and from and after such conveyance, all and every such pews shall be vested in the purchaser and his, her, or their heirs and assigns for ever.' Strong words these, but nevertheless it was held that no freehold was given. 'If,' said Willes J., 'If however the language of the Act were large enough to apply to the land itself, I should still be of opinion that in this context, without inflexible words, it would not have the effect of vesting in a layman other than the founder or rector the freehold of the church; there is a whole series of authorities in which words which in terms vested the freehold in persons appointed to perform some public duties, such as Canal Companies and Boards of Health, have been held satisfied by giving to such persons the control over the soil which was necessary to the carrying out the objects of the Act without giving them the freehold. In *Stracey* v. *Nelson*, 12 M. & W. 535, it was provided by an Act that certain lands should be "vested in" the Commissioners of Sewers, and the Court held notwithstanding that only the control over the land and not the freehold passed to them.'

I pass over the case of *Engelbank* v. *Nixon*, L. R. 10 C. P. 645, as the question raised was one of equitable rights of a creditor as against the trustee under a bankruptcy, and does not really affect the question of title in a purchase. And we now come to *Cohen* v. *Mitchell*, 25 Q. B. D. 262. There an undischarged bankrupt carried on business and borrowed money. A right of action for wrongful conversion having accrued to him, he assigned this right to the creditor from whom he had borrowed in consideration of the loan and of further sums necessary to carry on the action. A verdict having been obtained by the plaintiff in the action, the trustee in the bankruptcy intervened and claimed the benefit of the judgment before the money was paid over. The Court of Appeal affirming the decision of the Judge in the Court below dismissed this claim, holding that the interest in the result of the action had been effectually disposed of for value before the trustee intervened. In the course of his argument counsel for the appellant endeavoured to draw a distinction between money and other property, suggesting that it was difficult to see how a person who takes over property which he knows to belong to the trustee can get any title to it. Lord Esher M.R. said, 'I cannot on principle see that any distinction exists . . . . But does all the property acquired by the bankrupt after his bankruptcy belong to the trustee absolutely, so that the bankrupt is divested of all interest and property in it, or does it remain the property of the bankrupt, so that at any rate he can deal with it until the trustee intervenes?' And after pointing out that in an action affecting after-acquired property, a plea of the bankruptcy would be bad unless it alleged that the trustee had intervened, he states: 'That seems conclusive to show that the bankrupt has a property, whether absolute or not is immaterial, in such things till the trustee intervenes. On principle I cannot see why this should be confined to money. There is no reason for so confining it, but all the reasons which apply to a transaction as to money apply with equal force to any other transaction.' And then he lays down the following proposition as the result of previous decisions: 'Until the trustee intervenes all transactions by a bankrupt after his bankruptcy with any person dealing with him bona fide and for value in respect of his after-acquired property, whether with or without knowledge of the bankruptcy, are valid against the trustee . . . . The stress of bona fides is laid entirely and solely on the person dealing with the bankrupt.' Fry L.J. said, 'There is the greatest difficulty in supposing that every right acquired and every piece of property devolving upon the bankrupt after his bankruptcy and before his discharge vests in the trustee in the same manner in which the property at the commencement of the

bankruptcy has vested in the trustee.' And then after quoting the judgment of Tyndal C.J. in *Herbert* v. *Sayer* as above given, he goes on to say, 'Now I adopt that view with the single exception that I think the language "disaffirm his act" should be interpreted to mean intervene, because I do not think that a trustee who does intervene has any power retrospectively to disaffirm what has otherwise been validly done by the bankrupt, but from the moment of his intervention the property *vests* in him absolutely and can no longer be recovered by or dealt with by the bankrupt. Now that being the nature of the distinction between the two modes of vesting which has been long ago established, and which has not been in my opinion altered in any way by recent legislation in bankruptcy, it follows that the rights of the bankrupt in respect of after-acquired property must be very different from what they are in respect of other property; and it appears to me to follow from that distinction that not only payments of money made to a person who receives the money in good faith, but dispositions of personal or *other* property made by a bankrupt to a person who receives them in good faith must be valid.' And Lopes L.J. states that the proposition laid down by Lord Esher is a proper development of the principle of the previous cases.

From this decision, coupled with those previously referred to, we may I think draw the following conclusions. First, that after-acquired property does not vest absolutely in the trustee until he claims it, and then only subject to such prior dispositions as the bankrupt has made of it to a bona fide purchaser for value. Secondly, that the question of notice or no notice is immaterial. Thirdly, that the title of the purchaser is of the same kind as that which a purchaser under the Protected Transactions Clauses would acquire, though it is there subject to his not having had notice of the act of bankruptcy. And, lastly, that the proposition and principle on which it is based apply not only to money, not only to personal property, but also to *other* property.

Now it might have been thought that a rule like this was not only so wholesome but so simple that no further difficulty would have arisen on the subject. Questions of bona fides and value might arise, but otherwise there would be nothing in future to litigate. And yet Judges of great eminence have thrown doubts over its construction, which doubts, if correct, will I submit make the proposition a mere shadow of itself.

In re Rogers, ex parte Woodthorpe, 8 Mor. 241, Cave J. suggested that the protection given by the proposition was obviously meant to relate to cases in which the bankrupt is carrying on business without any interference by the trustee, and to protect persons who

deal with him in the ordinary way, and give him credit, and are paid with money which he acquires by carrying on such business. This suggestion was not really required for the decision in the case before him, for the Judge came to the conclusion that the money then in litigation was not after-acquired property of the bankrupt, but that it belonged to him previous to the bankruptcy, or at all events it was to be treated as if it had so belonged. The suggestion therefore was only a dictum. I venture with all the respect due to so able a Judge to submit that it was not correct. Treating it by backward steps, I submit that it seems to imply that only such persons as are paid with money acquired by the bankrupt in carrying on his business are to be protected; that is to say, that they may keep the money which they have received. This is not what *Cohen* v. *Mitchell* decided. The Court declined to confine the protection to cases where money was at stake, and did not attempt to make it apply to cases only where a bankrupt was carrying on a business. It was stated in the most general terms, and was based on the different modes of vesting of present and after-acquired property. There is, I think, nothing in any part of the judgments in the Court of Appeal, or in any except the oldest cases on which it is based, which will in any way approve the restrictions suggested in *re Rogers*. Whether it be true, as laid down in *Fowler* v. *Down*, that the property of the bankrupt in his after-acquired property is entire but liable to be divested, or, as stated by Fry L.J., that the property therein vests in the trustee absolutely from the moment of his intervention, or, as stated by Lord Esher, that it is immaterial whether the bankrupt has prior to such intervention an absolute property or not, but that he has a property, it cannot make any difference whether such property was acquired in business or otherwise. In our days at any rate it is not necessary for a bankrupt to have carried on any business or trade, and it is more than difficult to see why a wholesome principle of the kind mentioned, based on sound policy and convenience and to prevent a scramble for goods if the assignee does not choose to dispute the question, is to be confined to persons only who being bankrupt are carrying on business.

Let the question be tested in this way. Suppose an undischarged bankrupt not in business has a legacy left him which is duly paid. He lends the whole or a part of this to a friend. Could that friend refuse to repay the loan on the ground that the bankrupt had no property in the debt? Or if he had furniture left him, could the executors, because they knew of the bankruptcy, keep that furniture for themselves? *Res ipsa loquitur.*

But another difficulty was raised as to the application of the

decision in *Cohen* v. *Mitchell, In re New Land Development Association and Gray*, '92, 2 Ch. 138. There a question was raised on a Vendor and Purchaser Summons, whether an undischarged bankrupt could compel a purchaser under contract in relation to real estate devised to the bankrupt since his bankruptcy to accept title, the trustee in the bankruptcy claiming the property but declining either to waive his rights or to take any steps to enforce them. Here it is clear that a question as to the application of the principle might well arise, for the trustee had intervened; though it was open to argument whether his was a sufficient intervention under the circumstances. And moreover the case was covered by the rule that such a title involving a possible subsequent litigation could not be forced on an unwilling purchaser. But in giving judgment observations were made throwing doubts on the application of the proposition in *Cohen* v. *Mitchell* and the principles on which it was based to dealings with after-acquired real estate.

In the Court of First Instance Chitty J. said, 'The Courts have decided that there are exceptions from the property which prima facie ought to vest in the trustee as after-acquired property,' and he then refers to different kinds of personal estate; 'but,' he proceeds, 'I know of no decision that the principle upon which these authorities are founded includes real estate . . . . There has been no decision as to real estate, and no suggestion, as far as I am aware, in any of the decisions as to after-acquired property that real estate stands in the same position as goods and chattels, money earned in business, or other property, in regard to which the authorities have established what I may for convenience call an exception to the general rule.' He then refers to *Cohen* v. *Mitchell*, and admits that the wording of the proposition therein is wide enough to cover the case before him, but he says:—

'I cannot find a suggestion anywhere that the attention of the Lords Justices was drawn to the case of real estate . . . . The argument really amounts to this, that after-acquired real estate vests in the bankrupt and remains vested in him till the trustee by oral request or by a letter intervenes and claims it, and thereupon the legal estate shifts and passes to the trustee. It was not suggested that any conveyance is necessary: it is said that the legal estate passes by virtue of the statute, by an assurance hitherto unknown to the law, i. e. on an oral request, possibly verified by a statutory declaration or by virtue of a letter, which as a record of the transaction would have to be preserved as a document of title . . . . I do not say that Mr. Shurley (the bankrupt) might not have received the rents of his share of this property in the meantime. I only say that I see no justification in the statute or on the authorities for holding that the legal estate will first vest in the

bankrupt and then shift to the trustee when he intervenes. But even supposing . . . . that the proposition in *Cohen* v. *Mitchell* did apply to the present case, still I am of opinion that this is not such a title as could be forced on a purchaser.'

From this decision there was an appeal. On the hearing Kay L.J. said, 'There is this essential difference between real and personal property, that where a bankrupt is carrying on business and dealing with personal property, such dealing may and probably will to some extent consume it. And if the trustee looks on and does not intervene, then the consumption of the property goes on as a consequence of the carrying on of the business by the bankrupt. But what has that to do with real estate?' And Lindley L.J. said, 'The doctrine has been familiar to us for a good many years, and no doubt there is some sense in it as applied to personal estate. But I have never heard it suggested that it had the slightest application to real estate, which passes by conveyance and not by delivery.' The Court decided that the second point, that the title could not be forced on a purchaser, was fatal; but at the same time expressed an opinion that there was nothing in the first point. On reference to the report it will be seen that upon the Court intimating that the second point was fatal, the appellant's counsel abstained from further argument.

Important therefore as this case is as containing expressions of opinion from such authorities, it cannot be regarded as a conclusive decision on the point before us. It might even without disrespect be suggested that no decision of one Court as to the meaning of what was said by another Court can ever be satisfactorily conclusive.

I venture to ask whether, having regard to previous history, the observation of Chitty J. was strictly accurate when he said, 'Courts have decided that there are exceptions from the property which prima facie ought to vest in the trustee as after-acquired property.' Have the Courts ever so decided? We may set aside real property, as to which he admits there is no decision. We may set aside money earned in the course of carrying on business, for there is no prima facies that this ought ever to vest in the trustee or assignee; and I then ask, with all humility, Have the Courts ever treated the principle on which their decisions were based as one which in itself was based on an exception? The Courts have only decided that a trustee or assignee obtains an inchoate right to claim and recover the after-acquired property of the bankrupt, which inchoate right becomes abortive unless exercised before the bankrupt has parted with the property for value to a bona fide purchaser. Until such right of the assignee or trustee is validly exercised the bankrupt is entitled to deal with the property and

can make title to it. All after-acquired personal property stands on exactly the same basis, and the word exception seems, if one may say so, to have been used by the Court, *per incuriam.*

I do not think that it has ever been suggested that a statutory declaration of vesting would ever pass more than a deed executed by all proper parties at the time when the vesting is supposed to take place. By express enactment under the statutes of 1869 and 1883 this vesting takes place at the date of the original appointment of the trustee recognizing the prior practice, although perhaps not previously so explicitly laid down. Up to and inclusive of the year 1849 the statutes which referred to vesting said that it was to be done without any deed or conveyance: whereby I think it may be implied that they meant as perfectly as if such deed or conveyance had been then executed. But when, according to the law, did any one ever hear of a deed passing, actually passing at the time either personal property, then non-existent, or real property, to which the grantor or assignor had then no right, title, or interest? A conveyance of such property is void in law. No doubt it may be suggested that the doctrine of estoppel might operate, and that the bankrupt being estopped from denying the title of his trustee or assignee, the property when acquired would feed the estoppel, and that the trustee or assignee would thereby acquire a legal estate. But to this it can be answered that estoppels were never particularly favoured; that although they were allowed to operate when a person having a contingent interest levied a fine and afterwards acquired a vested estate, yet this doctrine did not extend to the case of lease and release by indenture, and that it had no operation, when it was clear that at the time of the conveyance the person whose title to property was purported to be conveyed had no interest therein. That the trustee or assignee gets a beneficial title, which he may set up by claim or by taking possession as against the bankrupt, is admitted; but that he gets a legal estate without an *actus interveniens* is respectfully doubted. The difficulty suggested by Chitty J. as to the legal estate in real property passing by an assurance hitherto unknown to the law, i. e. on an oral request of the trustee, is not greater than the difficulty of holding that a conveyance of to-day passes the legal estate in real property in which the person whose estate is conveyed has no interest real or equitable.

But it was admitted in the judgment in the *New Development Association* v. *Gray*, that if the trustee had not intervened the bankrupt might have received his share of the rents of this property in the meantime. It is not too much to assume, that had

the whole property been his it would have been admitted that he could have received the whole of the rents. If not, and if the property had been in lease at the time when it devolved on him, would the tenants have been justified in refusing to pay any rent unless and until the trustee intervened? Would there not have been what has been denounced as a scramble if the trustee did not choose to intervene? Again, if the property had not been in lease, and before the bankrupt entered, a third person with no title at all had chosen to take possession and the trustee did not intervene, would there have been no remedy by ejectment at the instance of the bankrupt? If he might have proceeded, and the law would not allow any one not being the trustee to plead or set up the bankruptcy, must he not have recovered by the strength of his own title? And how could this be, excepting by holding that he had a title? Could he make a lease? In fact one might go on multiplying in infinity the difficulties arising from the position, if a bankrupt takes no title and the assignees or trustees do not intervene.

If, on the other hand, the word 'vest' is read, as it may be read, as simply passing legal estate or entire property, where legal estate or entire property is actually existing in the bankrupt at the time of the bankruptcy, and giving to the trustees the right to clothe themselves with the legal estate or entire property with regard to after-acquired property found in the bankrupt or a volunteer from him at the time of their intervention, all difficulty passes away. If the estate which passes to or is acquired by the bankrupt is equitable only, the vesting in the trustee is not complete without a notice to the trustees of the legal estate or what is tantamount to the legal estate with regard to personal property, as is shown by *re Barr's Trusts*, 4 K. & J. 219, and other cases referred to in Griffith and Holmes' Bankruptcy, 254. And the only real difficulty which can be suggested in opposition to applying the proposition in *Cohen* v. *Mitchell* to real estate is in ascertaining where the legal title is. If it is held that the bankrupt takes it liable nevertheless to be divested from him by the act of the trustee and that in the meantime all his acts are valid, this difficulty is got over. And I submit that such is the result of the proper application of the principle evolved from the history of the subject.

E. COOPER WILLIS.

RECENT QUESTIONS OF INTERNATIONAL LAW.

The Behring Sea Arbitration.

THE result of the Behring Sea Arbitration furnishes matter for congratulation to friends of civilization and of peace within the community of civilized States. A forward step has been marked in the progress of International Arbitration. It is no longer necessary for an English writer on International Law, reasoning on the result of a great arbitration, to warn this State against rashly consenting to this pacific method of settling differences, in view of foreign jealousy of British prosperity. All the foreign arbitrators decided for the British claim [1].

At the same time, it would be an error to exaggerate the exact value of that step in advance. No one supposes that differences between States, even of the Family of Nations, when of vital importance, will be submitted to the arbitrament of any tribunal, however impartial. The greatest of all such questions, that of the Alsace-Lorraine annexation, can only be settled by the sword or common agreement between Germany and France.

But between the two great sections of the English-speaking world, the practice of arbitration is becoming a settled habit. It is eighty years since the two States have met in armed conflict. The year 1893 has signalized the cordial assent of the British and the United States Governments to a proposal to establish on a permanent footing the custom of referring to arbitration all questions of difficulty. Let us hope the example will spread to all States of the community of Christendom. Possibly the great conflict which now threatens Europe in arms will hasten the arrival of a time when the inevitable reaction will incline the minds of European peoples towards internal peace. The revulsion in the popular mind which followed the Thirty Years' War gave the first great impulse towards the acceptance by Europe of the system of Grotius.

The effect of the award of the arbitrators on the positive rules of the Law of Nations is twofold. In the first place, the invalidity of the American claim to a property in seals while in the high seas, outside the three mile limit, is established [2]. Roman Law maxims, the foundation of so much international law, have proved once again inadequate to decide modern international relations. It is

[1] Treaty of Washington, February 29, 1892. Art. VI. Points 1, 2, 3, 5, Award, August 15, 1893.

[2] Award, Point 5, 'The United States has not any right of protection or property.'

plain that a most inappropriate strain is put upon the Roman rule when its test of private ownership of animals on land—the *animus revertendi*—is made to do duty in the decision of public ownership of animals *ferae naturae* in the high seas. The verdict of the arbitrators in this matter must carry conviction.

The next notable result is the declaration in favour of freedom of the seas. The American claim to jurisdiction on the high seas—singular indeed when revived by a Republic as successor to a Tsar—was based on Russian ukases of seventy years ago, challenged at the time of promulgation by the British Government, and afterwards abandoned by Russia [1]. It seems rather late in the day to have to reassert the freedom of the high seas—one of the chief results of juristic influence on the positive Law of Nations. Still it is to be remembered that the British claim to jurisdiction over the seas around these islands was thought worthy of citation in the *Franconia* case, less than twenty years since.

The Canadian feeling towards the award should not be unnoticed. The Canadian contention, emphasized by the dissent of the Canadian arbitrator [2], is that though the British are declared entitled to capture seals on the high seas, the prohibition to capture within sixty miles of the Pribilov Islands renders the privilege valueless [3]. Again, the period of close-time is too long [4]. Lastly, no regulation has been established over sealing on land, and as the Americans are the sole owners of the seal islands, the net result is that the Canadians are put under restriction in the only place where they can capture seals, while the Americans are under no compensatory restriction on land.

As regards the last complaint, it is plain that the fault, if fault there be, was not that of the arbitrators. The terms of the reference to arbitration, drawn up by the United States and the British Government, did not authorize the framing of regulations for land sealing.

It is said that negotiations are on foot to meet the Canadian claims. In any case, the regulations are subject to revision after the close of the first period of five years for which they are established [5].

Brazil.—United States Intervention.—Right of Asylum.

There seems little prospect of useful contribution to the international law of war from the minor conflicts which so continually

[1] Award, Points 1, 2, 3.
[2] The Regulations are enacted by a majority consisting of Baron de Courcel, Lord Hannen, the Marquis Visconti Venosta, and Mr. Gregers Gram.
[3] Regulations, Art. I.
[4] Regulations, Art. II.
[5] Regulations, Art. IX.

convulse the Spanish and Portuguese States of South America. The lessons to be derived seem rather to be on the applicability of representative institutions to that Peninsular section of Europeans, who, strange to say, were the first to evolve in the Middle Ages that theory of political representation, the successful working of which has become almost exclusively British.

At the same time, the action of the United States fleet, supported by the declarations of the French and Austrian naval commanders, to prevent the insurgent ships from firing on neutral vessels, will form an important precedent in the history of the recognition of insurgents as belligerents. The United States, and all other powers, refused to accord a recognition of belligerent rights over neutral commerce to the revolters against the Brazilian Government now in power.

This action rather tells in favour of the American contention during the War of Secession—that the British recognition was precipitate. It must be noted, however, that, unlike the Confederates, the Brazilian insurgents do not seem to have constituted any regular government with a definite territory. It was rather a war between the elephant and the whale—between the land and the sea forces of Brazil.

It is part of the contrasts of history that the United States, the recognition of whose belligerent rights by France in the war of the revolted colonies forms so remarkable a precedent, should so strongly in 1864 and 1894 oppose the recognition of revolters as belligerents.

The assertion by the Portuguese Government of the right of asylum—refuge having been accorded by its warships in Brazilian waters to fugitive insurgents—has had the rather singular consequence of provoking a diplomatic rupture between the Brazilian and Portuguese Governments. A controversy extending from March 14 terminated with an official notification, in Lisbon on May 15, that the Brazilian envoy was recalled. Little can be said for the wisdom of the present rulers of Brazil in taking issue with the Portuguese Government on such grounds, in a controversy in which the Portuguese are so obviously in the right, and the Brazilians so plainly in the wrong.

The Argentine Treaty of Extradition.

The Treaty of Extradition between the British Government and the Argentine Republic was concluded as far back as May, 1889, but was not ratified until December, 1893[1]. The Alsatias for fugitives from justice are being gradually abolished.

[1] Order in Council, January 29, 1894, applies the Extradition Acts to the Treaty as from February 9, 1894.

The Argentine law, unlike the English, sanctions, subject to judicial investigation and approval, the process of surrender without treaty [1]. Unlike the law in continental countries, Argentine law does not permit surrender by administrative order without judicial sanction. The presence of the writ of *habeas corpus*, of the 'recorso de amparo,' and of a special chapter on 'abuse of authority' are significant of the supremacy of the Courts of Justice in this most law-ruled of the Latin Republics [2]. The Supreme Court has special jurisdiction in suits relating to foreigners, and the Executive Power is forbidden by the Constitution to interfere in the cognizance of pending suits [3].

The question, discussed at length in the press [4], whether a fugitive bank director, who fled to the Republic before the ratification of the Treaty, can be extradited, is therefore one to be decided by the Argentine Courts. The permission of the Executive only enables the process of trial to begin [5]. The Court will first have to decide whether the Treaty is applicable. Does the ratification in 1893 make the Treaty relate back to 1889—the time of negotiation? Does the Argentine Constitution forbid an *ex post facto* application of this Treaty [6]? The Treaty is certainly retrospective in England, but before the Extradition Acts, English Judges held that the clause in the United States Constitution, which forbids *ex post facto* legislation, prevented the United States Treaty, and so the British Act, from being retrospective in England [7]. United States Judges have interpreted their Constitution differently [8].

If the Argentine Courts hold that the Treaty is inapplicable, they are then required to decide on the validity of a demand of extradition in accordance with 'the principle of reciprocity or the uniform practice of nations [9].' As to the latter alternative, there appears to be no uniform practice apart from treaty. British practice is to refuse extradition. As regards the requirement of reciprocity, what test is to be taken? Is the condition satisfied by the conclusion of a Treaty by the British Government, or by the fact that the late Treaty is by British Statute retrospective in England? If, as seems more probable, reciprocity implies surrender

[1] Código de Procedimientos Criminales, 646.
[2] Cód. Proc. Crim. 617 (*habeas corpus* etc.). Código Penal. (Abuso de Autoridad) 243.
[3] Constitucion Reformada de la Nacion Argentina, 95.
[4] See Times, February 5, 1894, 'The Argentine Law of Extradition and J. S. Balfour.'
[5] Cód. Proc. Crim. 652.
[6] See Const. 18, and compare Const. Prov. Cordoba, 24.
[7] *Clinton's* case, 1843. Forsyth's Constitutional Cases, 366.
[8] Moore, 'Extradition,' 88: Judge Blatchford in Giacomo's case.
[9] Cód. Proc. Crim. 646. 'A falta de tratados segun el principio de reciprocidad ó la practica uniforme de las naciones.'

in a precisely analogous case, there appears to be no reciprocity. In a case in which an English Court had held the late Treaty not to be applicable, the Court would certainly discharge an Argentine fugitive, and refuse to permit his extradition.

The Courts will also have to decide on the applicability and the force of those provisions of the Argentine Law of Extradition which provide that the accused person, if extradited, is not to receive a heavier penalty than that awarded by Argentine law[1]; and the provision that a citizen can elect trial in the Republic[2]. Do these provisions apply to treaty extradition? If they do, or if the surrender is not under treaty, how are these conditions to be safeguarded?

Not merely is its connexion with one case of general interest, but in its bearing on the future working of the Treaty, the decision of the Argentine Courts will be one of importance.

Russia in Southern Europe.

The proposed deepening by Russia of the Kilia branch of the Danube is of the greatest moment, in view of its possible effect on the opening to commerce of European waterways, and on the application to the Danube of the principles of the Congress of Vienna. It is also of importance as likely to imperil the efficiency and even the existence of the first of those permanent European Commissions, whose growth of late years has been so striking, and which testify so eloquently to the existence of the community of Europe.

The European Commission of the Danube, established by the Treaty of Paris of 1856, was given general jurisdiction over the three mouths of the Danube. As a result of its annexation of Roumanian territory after the Russo-Turkish war of 1877, Russia found itself riparian proprietor along a large portion of the Kilia branch. Since then the Russian Government made several efforts to exclude the Kilia channel from the control of the European Commission.

Some writers on this subject appear to think that the determinant of European rights in regard to the Kilia branch is to be found in the Treaty of Paris of 1856 or the Treaty of Berlin of 1878. Except as throwing light on the spirit and object of the States of Europe, and so interpreting a later Treaty, appeal cannot now be made to either of those compacts. It is the Treaty of London of March 10,

[1] Cód. Proc. Crim. 667 and 669. And see Cód. Penal. 198 to 207.

[2] Unusual facilities are presented for acquiring citizenship, without any requirement of a previous term of residence. Ley de la Ciudadania Argentina, Tit. ii.

1883, which now determines the rights of Europe in regard to the Danube.

It will be clear from a perusal of Articles V and VI of this Treaty that any use of the concession then made to Russia and Roumania of control over a part of the Danube, which would have as an effect the setting up of a commercial rival to the European Commission, or any injury to the flow of water in the Sulina Channel, would be a distinct infraction of the Treaty of London[1].

It seems regrettable that in 1883 assent should have been given to removing the Kilia branch from the jurisdiction of the European Commission, and so laying a foundation for future conflict[2].

The rumoured cession of an island in the Mediterranean by Greece to Russia, to serve as a site for a naval station, raises definitely the question of the international status of that kingdom, freed by Europe from Turkish misgovernment, and constituted independent by the Treaty of July 6, 1827. It points out, by way of contrast, the wisdom of the neutralizing of Belgium in 1830. As regards the cession of one of the Ionian Islands, by the Treaty of London of November 14, 1863, amended by the Treaty of London of March 29, 1864, the islands of Corfu and Paxo and their dependencies are neutralized, and the cession would be invalid as against Europe. As regards the other Ionian islands, a cession would be plainly against the spirit of those treaties by which the British nation, with the design of uniting the Hellenic people under one government, ceded the islands to Greece. As regards the cession of any portion of Greek territory, it is to be remembered that the object of the Treaty of 1827 was not to set up an agency for transferring territory to one or other of the Great Powers, but to establish, for the peace and security of Europe, an independent Greece. By Article V of that Treaty, the Powers agree not to

[1] Treaty of London, March 10, 1883. 'Art. III. La Commission Européenne n'exercera pas de contrôle effectif sur les parties du bras de Kilia dont les deux rives appartiennent à l'un des riverains de ce bras. Art. IV. Pour la partie du bras de Kilia qui traversera à la fois le territoire Russe et le territoire Roumain, et afin d'assurer l'uniformité du régime dans le Bas-Danube, les Règlements en vigueur dans le bras de Soulina seront appliqués sous la surveillance des Délégués de Russie et de Roumanie à la Commission Européenne. Art. V. Au cas où la Russie ou la Roumanie entreprendrait des travaux soit dans le bras mixte, soit entre les deux rives qui leur appartiennent respectivement, l'autorité compétente donnera connaissance à la Commission Européenne des plans de ces travaux dans le seul but de constater qu'ils ne portent aucune atteinte à l'état de navigabilité des autres bras. . . . . En cas de divergence entre les autorités de la Russie ou de la Roumanie et la Commission Européenne quant aux plans des travaux à entreprendre dans le bras de Kilia . . . ces cas seraient soumis directement aux Puissances.

'Art. VI. . . . . Toutefois, en vue de sauvegarder les intérêts reciproques de la navigation dans le bras de Soulina et le bras de Kilia, le gouvernement Russe, afin d'assurer une entente à ce sujet, saisira les Gouvernements representés dans la Commission Européenne des Règlements de Péage qu'il jugerait utile d'introduire.'

[2] See Times, December 26, 1893. 'Russia and European Control of the Danube.'

seek any extension of territory in the territorial re-arrangements concerning Greece; an unmistakable indication of the whole purpose of the Treaty.

In view of recent discussions on the value and efficiency in war of European regulation of the Dardanelles and the Bosphorus, it is worth recalling that the present rule is based on the Treaty of Paris of March 30, 1856, as modified by the Treaty of London of March 13, 1871. Originally the closure of the Straits against ships of war was a municipal regulation of Turkey, the Black Sea being a Turkish lake. When Russia acquired, by conquest, territory on that sea, the closure of the Straits was held of moment by the other States of Europe. Accordingly it was taken under the protection of Europe by the Treaty of London of 1841, followed in this particular by the Treaty of Paris of 1856 and the Treaty of London of 1871. The last two Treaties are generally confirmed by Article LXIII of the Treaty of Berlin of 1878. Under the 1871 Treaty, the Porte is empowered to open the Straits to ships of war of allied powers, should this step be deemed advisable to secure the performance of the Treaty of Paris of 1856[1].

The Quadruple Treaty of London of 1840 contemplated as possible a different method of securing the neutralization of the Straits. That method was to place Constantinople and the Straits under the safeguard of the Great Powers. This project no doubt suggested the subsequent proposals of writers on international law—to solve the problem of the sovereignty over the key of the Black Sea by placing the city and Straits under the control of a European Commission.

The International Situation in Egypt.

The international agreements which regulate the present situation in Egypt are the Convention of Constantinople of 1885, between the British and Turkish Governments, the Convention of Constantinople of 1888 between the Great Powers, and the Règlement d'Organisation Judiciaire of 1874 prolonged by Khedivial decree and other acts of State on the part of the various powers affected.

The Règlement d'Organisation Judiciaire pour les Procès Mixtes expiring on February 1, 1894, has been prolonged for another quinquennial period by decree of the Egyptian Government. Applied to British subjects originally by the Agreement of

[1] Treaty of London, March 13, 1871. 'Art. II. Le principe de la clôture des Détroits des Dardanelles et du Bosphore tel qu'il a été établi par la Convention séparée du 30 mars, 1856, est maintenu, avec faculté pour Sa Majesté Impériale le Sultan d'ouvrir les dits Détroits en temps de paix aux bâtiments de guerre des Puissances amies et alliées, dans le cas où la Sublime Porte le jugerait nécessaire pour sauvegarder l'exécution des stipulations du Traité de Paris du 30 mars, 1856.'

Alexandria of 1875, it is now applicable under the Order in Council of 1889. Its working for the last twenty years supplies a useful illustration of the advantages in the administration of justice to be derived from a fusion of the originally separate consular jurisdictions of European States. It is also useful in the light it has thrown on the possibility of united action by European powers in relation to non-Europeans.

The Convention of Constantinople of 1888, providing for the freedom of navigation of the Suez Canal, is another illustration of the possibility of such action. United Europe is interested in the maintenance of a free waterway to the East, and has taken joint action to place that desirable state of things beyond the influence of hostile operations from any quarter or of native caprice or maladministration.

There was at one time a prospect that the unity of European action, now signalized in the administration of justice in Egypt, and in the regulation of the Suez Canal, might also be illustrated in the general government of the country. The French Government was invited in 1882 to co-operate with the British in the restoration of order in Egypt and in the foundation of a stable government under European supervision. As the weight of these heavy tasks was thrown on the British alone, their rights in Egypt must necessarily have been modified since 1882. It is important, therefore, in view of future developments, to consider the origin of the rights of the British Government in Egypt.

The pressure of material facts, not concession from Sultan or Khedive, furnishes the origin of European, and more particularly French and British rights in Egypt. The necessities of commerce with the East cause European rights to be independent of the wishes of any local administration. Specially in the case of France, the construction of the Suez Canal and of other great engineering enterprises has served to strengthen the claim of the French Government. As regards the British Government, its laborious task of the last twelve years, and the rights therefrom accruing, must be considered as strengthening those claims it possesses in common with other governments to demand guarantees for the maintenance of a free waterway through the Canal. But the rights of this kind of the other European powers must become insignificant in presence of those of the possessors of the Empire of India.

That this has been the consistent position of the British Government may be seen from the history of British intervention during the Russo-Turkish war of 1877. Lord Derby's Despatch of May 6, 1877, defines categorically British rights in the East,

and demands in particular that Russia is to abstain from attacking Egypt. The Despatch of Prince Gortschakoff of May $\frac{19}{31}$, 1877, gives that express undertaking. British interposition on that occasion, therefore, shielded Egypt from a Russian invasion.

No clearer proof could be adduced that the British Government has never based its rights on any concession from Turkish or Egyptian authorities than its interposition, and preparation to have recourse to arms, in 1877, five years before the actual British occupation of Egypt.

The Convention of Constantinople of 1885 between the British and Turkish Governments cannot therefore be in any way the source—can in fact only regulate the exercise of British authority in Egypt, and a possible termination to that authority. The agreement between the two Governments as to the arrival of a period within which withdrawal would be advisable is an event which has not yet happened: and on the happening of which it is apparently useless to speculate[1].

The British Government and the Chartered Companies in Africa.

The simultaneous movement of so many of the European States towards the annexation and colonizing of African territory, has given occasion for the adoption of a better method in regard to disputes than settling them by peaceful means when they arise. It consists in preventing or lessening the probability of their arising. The Treaties between the Great Powers delimiting their respective spheres of influence in Africa show a growing perception of a common interest of Europeans in the face of barbarian races[2]. The charter of the British South Africa Company of October 29, 1889, by its extension of reciprocal privileges to those of European descent, is sufficient proof of the British Government's perception that the interest of Europeans is one[3]. The minimizing of the

[1] 'Dès que les deux Hauts Commissaires auront constaté que la securité des frontières et le bon fonctionnement et la stabilité du Gouvernement Egyptien sont assurés, ils présenteront un rapport à leurs gouvernements respectifs, qui aviseront à la conclusion d'une Convention réglant le retrait des troupes Britanniques de l'Egypte dans un délai convenable.'

[2] Agreement of Berlin (Great Britain and Germany), July 1, 1890. Arrangement of Paris (Great Britain and France), August 10, 1889. Declaration of London (Great Britain and France), August 5, 1890. Agreement of London (Great Britain and Portugal), November 14, 1890. And see Agreements with Germany April to June 1885, July 15, 1886, October to November, 1886, July 1887. Rules for future occupation of Africa, in General Act of the Conference of Berlin, February 26, 1885, ratified April 19, 1886.

[3] Charter of British South Africa Co., Westminster, October 29, 1889, 'The opening up of the said territories to the immigration of Europeans.' Compare corresponding passages in the Charter of the British East Africa Co., September 3, 1888, and of the National African Co. (now the Royal Niger Co.), July 10, 1886.

prospect of internecine warfare between Europeans must be counted as tending to the strengthening of the Law of Nations by showing clearly that its base is racial.

The historic policy of the British Government, justified by its greatest success in India, to extend its colonial empire through the agency of commercial companies, is now being pursued in Africa. It is therefore desirable that a clear understanding should be arrived at as to the nature of the international responsibility towards Europeans of other nationalities, which may arise from the acts of the Chartered Companies.

The allegations made by Belgians of the Congo State—a creation of international compact[1]—that agents of the Royal Niger Company had furnished arms to Arabs in the interior, in violation of the Slave Trade Convention; the allegation of French envoys that they had been impeded in their journeys by agents of the same Company; the proximity in South Africa of Portuguese, Germans, and Dutch to the field of operations of the British Company—all render it desirable that there should be no doubt as to the nature of the obligation, as well as of the remedy, in respect of well-founded complaints.

It is therefore satisfactory that the highest English tribunals should have been called on to define this relation. In the case of the Portuguese Company of Mozambique instituted against the British East Africa Company the view of English Courts is seen to be that the British Government is responsible for acts of the Chartered Companies in so far as they are acts of State, and not simply commercial contracts[2]. But its responsibility is diplomatic, and is not to be adjusted in Courts of law. As Mr. Justice Wright expressed it, aggrieved Portuguese may seek redress for acts of State of the Company from the Crown. In the language of the pleading of the East India Company in the case of the Nabob of Arcot, in 1791, the Company is the delegate of the British Government, in so far as regards acts of State.

The discussion raised in Parliament as to the action of the British South Africa Company in its military operations against the Matabele chief Lobengula, and the alleged violation of International Law involved in the shooting of his envoys, bring again into prominence the fact that the foundation of the Law of Nations is race. The community of beliefs, opinions and customs, which is

[1] Conference of Berlin, General Act, and see Convention of Berlin, December 10, 1884 (Great Britain and the 'King of the Belgians, acting as Founder of the International Association of the Congo').

[2] *Companhia de Moçambique* v. *British South Africa Co.*, '92, 2 Q. B. 358, 375, 61 L. J. Q. B. 663; '93, A. C. 602, 6 R. Jan. 1, 63 L. J. Q. B. 70.

shared by all sections of the European race in Europe and all over the world, alone renders international laws of war efficient or even possible. The alleged execution, or the manner of it, are disputed; but the appeal to the Law of Nations makes it essential to recall that the reciprocity of obligation it assumes, the mental basis it rests upon, are the historic inheritance of the European race. The obligations of justice and humanity are not to be confined in their exercise to Europeans, but the rules of the Geneva Convention can have no true application in wars against enemies of civilization who do not acknowledge their force.

Spain and Morocco.

The attack by the Riff tribes on the Spanish forts at Melilla, and the despatch of an army of 20,000 troops to Morocco, seemed at one time to have determined Spain to take part in the great European movement towards the subjugation of Africa already participated in by British, French, Italians, Portuguese, Belgians, Germans and Dutch. This step seems now postponed at least[1].

The only question of International Law likely to arise, as distinct from those already touched on in regard to African colonization, would be the effect on British and other consular jurisdiction of a Spanish annexation. British consular jurisdiction in Morocco, of which the Supreme Court of Gibraltar is the Court of Appeal, is established by the Treaty of Tangier of December 9, 1856, and the General Treaty of Madrid of July 3, 1880, and regulated by British Orders in Council. Following the precedent of Tunis[2], the British consular jurisdiction would cease *ipso facto* on any Spanish annexation.

Notwithstanding the intentions attributed to the British Government by various continental writers, it seems hardly probable that any question would arise of a revival of ancient British treaty rights to the ownership of Tangier. It is true that British abandonment of the territory—which formed, with Bombay, part of the dowry of Catherine of Braganza—was not a cession to Spain.

France and Madagascar.

The recognition by the British Government of the French Protectorate over Madagascar in exchange for the cession of

[1] [The consequences of the late Sultan's death, which has occurred since this paper was in print, remain to be seen.—Ed.]

[2] British Order in Council, December 31, 1883, 'British subjects in the Regency becoming justiciable by the said French Tribunals.'

French rights over Zanzibar, has given rise to not a few novel questions of International Law[1].

The United States Government has not recognized the Protectorate, and treats with the native Hova government direct, instead of through the French Resident. Again, certain British subjects are accused by the French of having imported arms to assist in an insurrection of the Hovas against the Protectorate.

As regards the first matter, it seems regrettable that in a case in which the interests of the United States can hardly be involved, the British recognition of the French Protectorate should not be acquiesced in by the American Government. The concern of the United States for the progress of civilization among the inferior races should not be the less vivid from the fact that the vexed problem comes home in the case of the remnant of the American red men and in that of the seven millions of emancipated negro slaves in the Southern States. Any effect the United States action can have must only be to induce France to convert its protectorate into annexation by force of arms.

As regards the second point, British international responsibility is undoubted. Facts such as those alleged, if proved, would give rise to a new *Alabama* claim.

France and Siam.

The recent French naval operations in Siam, and the Treaty of peace which was their termination, have left as a result a singular question of International Law[2]. The state of the right bank of the Mekong may be described as anomalous. It is left nominally under Siamese dominion, but the Siamese are forbidden to maintain troops within twenty miles of the bank, or to put war-steamers on the Great Lake[3].

Who is responsible for disorder, and possible injury inflicted on British or other travellers? From a jural point of view at least, a policy of frank annexation would be less confusing in its results. Then France would be plainly responsible.

The policy advocated by both British and French writers of the creation of a 'buffer State'—to prevent friction, would not at all interfere with the existence of the international anomaly referred to.

The retention of the fortress of Battambang as a guarantee for the execution of the Franco-Siamese Treaty furnishes an instance

[1] Declarations of London, August 5, 1890, II. Art. 1. The British Government 'recognizes the Protectorate,' 'with its consequences.'

[2] Treaty published October 3, 1893.

[3] Treaty, Art. 2.

of almost the sole surviving method of treaty-guarantee under International Law.

The Treaty is also noticeable for the clear distinction it draws in terms between 'citizens' and 'subjects' of the French Republic. As conducive to clearer ideas on the relations between European States and subject races, the precedent is memorable. In British official language, the ungraceful circumlocution—'British-protected person' is made to do duty for the word 'subject;' as the latter word is already used to denote a capacity which is, strictly speaking, that of British citizen.

There is some confirmation of the original report that the Tartar Government of China was to be invited to assume the sovereignty of a proposed 'buffer State' between British and French possessions. If such a design be entertained, it certainly seems a rather gratuitous method of preparing the way for future trouble with the common danger to Europeans in the East.

Japan and European Consular Jurisdiction.

The Oriental agitation which originated some twenty-five years ago in Egypt against the extra-territorial jurisdiction of European Consuls has now spread to the far East. The Chinese method of making war on this jurisdiction is indirect and covert; but of late the Japanese has been more avowed. Inasmuch as all impartial European residents in the East are unanimous in regarding the consular jurisdiction as the chief protection of European life and honour, it seems important to point out two fundamental errors which underlie the whole agitation.

It is not by virtue of the Treaty of Yedo [1], entered into with the Tycoon, that the right of British consular jurisdiction exists. The Treaty only recognizes and regulates the exercise of the right. The right would exist if the Treaty were abrogated. It has been for centuries a positive rule of the Law of Nations not to abandon Europeans to the criminal jurisdiction, or rather to the distantly analogous criminal institutions, of non-European races.

The other error consists in supposing that the new Japanese Codes, framed on European models, can make any difference. It is not the texts of the law, but the administration of the law, the application of the texts, that is in question. European codes are idle words without European Judges.

The contention, therefore, that the Treaties with Japan are abrogated by change of circumstances, springs from a total

[1] August 26, 1858: extended to the Mikado by British Order in Council, May 13, 1869.

disregard of the true basis of the Law of Nations[1]. The community of law, on which the Law of Nations rests, is the product of slow centuries of the life of the European race, and cannot incorporate, by a sudden movement, foreign elements. The diplomatic comedy of admitting the Turkish Government, by the Treaty of Paris of 1856, to the 'Concert of Europe,' has had no effect but to continue the misgovernment of Christian subjects of the Porte.

THE UNITED STATES CHINESE EXCLUSION ACT.

The United States Chinese Exclusion Act, from the point of view of International Law, presents an aspect deserving of serious attention.

The general right of States to exclude alien elements, even as among States of the European race, is admitted under International Law, and the exercise of the right is to be left to the discretion of each State, guided alone by its own judgment of public expediency and justice.

The right is certainly not less in regard to subjects of States not members of the Family of Nations. In the particular case of China, the right is strongest of all. It argues a considerable degree of hardihood on the part of the Tsung-li Yamên to appeal to the Law of Nations on this head of alien exclusion—assuming for the moment that the Tartar Government is entitled under any circumstances to appeal to that law[2]. For the Tartar Government rigidly excludes foreigners from China except in a few treaty ports. In all that extensive territory of 400 millions of inhabitants, there are, omitting some philanthropic missionaries, only 8,000 persons of the European race[3].

Foreigners are not allowed to reside anywhere except in the treaty ports. An exception, of a validity disputed by the Tartar Government, exists in the case of missionaries[4]. Foreigners are not even allowed to pass into the interior except registered in an official register, and provided with official permits.

But the facts transcend the letter of the Treaties. Travel in China is most dangerous, owing to officially fomented riots against

[1] See Professor Paternostro, of Tokio, in the Revue de Droit International, 1891, pp. 5 and 176: and M. Kentaro Kaneko, 1893, p. 338. And the reply of Sir Travers Twiss to the first named—1893, p. 213. It is to be regretted that such an unrealizable hope as to the abandonment of consular jurisdiction should be even hinted at in the United States and British Treaties with Corea of 1883. Professor De Martens rightly refuses to regard the jurisdiction as a revocable privilege depending on the will of non-European rulers.

[2] Times, August 19, 1893.

[3] In 1892, only 8,107, Clunet, 1892, p. 546. Only 25 American merchants in China, T. J. Geary in North American Review, July, 1893.

[4] R. S. Gundry in Fortnightly Review, July, 1893.

foreigners. Residence in the interior, even for the missionaries allowed under Tartar protest to reside, is accompanied by daily peril to life[1].

The remarkable contention, therefore, of the Tsung-li Yamên that the presence of 110,000 Chinese subjects on American soil cannot be terminated without breach of International Law, may be summarily dismissed. There is none of that reciprocity on the side of the Tartar Government which underlies all valid claims to appeal to the European Law of Nations.

From the point of view of treaty stipulation, the contention of the Tsung-li Yamên is still more invalid. The Burlingame Treaty of 1868 was in effect simply a stipulation that the Tartar provincial mandarins would not prevent Chinese labourers from emigrating—emigration hitherto having been a Tartar crime equivalent to desertion—and not at all a promise to admit, regardless of consequences, unrestricted Chinese immigration. The British Treaty with China has been officially interpreted by the British Government in that sense[2]. The later United States Treaty of 1882 sanctioned the exclusion of Chinese labourers; and it is on record that, during the negotiations of 1888, the Tsung-li Yamên actually suggested their permanent exclusion from the United States[3].

This last fact points to the necessity of considering the real motive of the Tartar Government in pretending to regard as a grievance a measure towards which they really have no objection. A well-known British administrator gives us the clue to their policy[4]. They wish to manufacture grievances to serve as diplomatic material in their efforts to secure the abrogation of the consular jurisdiction. And they want the consular jurisdiction abrogated in pursuance of the settled Tartar policy to exclude the European race from China, lest the downfall of their rule over the Chinese millions should ensue from European inspection of their methods of government.

Not to enter into detail into Russian precedents and those of other States of the Family of Nations, it will be sufficient to refer to British precedents, which are instructive in their confirmation of the international legality of Chinese exclusion as well as of its constitutional validity. Suffice it to say, that the Australian Acts have been upheld by the Judicial Committee of the Privy Council[5].

[1] See the whole series of Blue Books on China; and particularly Blue Book, China, No. 1 of 1892. And H. N. Lay, Relations with China, 1893.

[2] Lord Knutsford in the House of Lords and Baron de Worms in the House of Commons, June, 1888.

[3] President's message to Congress on 1888 Act.

[4] Sir J. P. Hennessy, Nineteenth Century, 1888, p. 617.

[5] *Musgrove* v. *Chun Teeong Toy*, '91, A. C. 272, 60 L. J. P. C. 28.

The Canadian Act has never had its validity disputed. It is to be remembered that the British treaty relations with the Tartar administration are the same as those of the United States.

Apart from the rule of reciprocity under the Law of Nations and treaty rights in particular, the justice of Chinese exclusion remains to be considered. For the League of the States of Christendom, justice, we must believe, is ever the highest policy, and considerations of justice must form a fundamental part of International Law. The justice of Chinese exclusion is clear when we once apprehend that it is a matter of life and death to the European race to keep to itself those temperate regions, such as the United States and Australia, in which alone they can live in health. As has been pointed out, Europeans are denying to the yellow race nothing which it cannot find in its own country—with its vast uncultivated territory in Manchuria, the 'land of grass'—and in other regions, such as the Malay peninsula, where the white man can be only an exotic [1]. That the industrial extermination of the white labourer is the inevitable result of unrestricted Chinese immigration has been proved beyond question in America and Australia. It is understating the case to say that the standard of existence of the white labourer is lowered by Chinese competition. The white labourer cannot subsist on the wages of the Chinese, whose wants are fewer, as a result chiefly of his lower stage of civilization, and partly of the fact that, unlike the white man, he has no family to support. The white labourer is simply starved out of existence, or driven out of the country. In a word, justice to Europeans demands Chinese exclusion.

If any conclusion is to be drawn from these considerations, it must be that international action to strengthen the hands of the United States may be fairly expected from the Mexican, Canadian, and British Governments in the repression of Chinese immigration over the United States borders; and from all States of the Family of Nations at Pekin, where the Council of Foreign Ministers has, as a necessity of self-defence, assumed an almost corporate existence [2].

Anarchists and Asylum.

The validity of the claim of accused Anarchists to the asylum which International Law accords to political refugees has been

[1] C. H. Pearson, National Life and Character, p. 16.

[2] See Blue Book, China, No. 1 of 1892, and Tartar protest against the 'joint notes' of the Foreign Ministers.

raised recently in English Courts, in the case of fugitives whose extradition was demanded by the French Government[1].

The Treaty of Extradition between the French and British Governments, like all modern Treaties of a like character, declares that political offences are not extraditable[2]. The English Court of first instance held that the offence of complicity in Anarchist outrages by means of explosives used in Paris was not an offence of a political character. The ground alleged by the magistrate for this decision—that the Anarchists' motive of general hostility against all governments rather than against one in particular prevented the offence from being political—has not been adopted by the Queen's Bench Division, which holds the Anarchist offences non-political on a different ground[3]. To constitute a political offence there must be two parties in a State, each seeking to impose its government on the other; and the offence must be primarily directed against a Government, and only incidental against private persons. It holds as a fact that the Anarchists do not seek to impose government, and direct their outrages primarily against citizens.

Not to stop to dispute these decisions of fact, it is at least arguable that to describe the Anarchist outrages as non-political is to apply to the term an unusual and forced construction. If political offence means anything it must mean one committed with the object of altering political institutions[4].

The truth is that facts, as usual, have outgrown the law. The Anarchist offences are political: but were not contemplated by the framers of the Treaties as conceivable. It would be simpler to say that although political they are extraditable. This, however, would necessitate the revision of present Treaties. To hold that they are not political is simply to supplement the *lacunae* of treaty and statute by judicial legislation. This may be a ready road, but the confusion of terms is not a trifling objection.

Neither can the mere atrocity of the Anarchist outrages—though not stated as a ground for the decisions referred to—be held to

[1] *François* case, Times, March, 1893. *Meunier* case, Queen's Bench Division, June 11, 1894.

[2] Treaty of Paris, August 14, 1876, 'No accused or convicted person shall be surrendered if the offence in respect of which his surrender is demanded shall be deemed by the party upon whom it is made to be a political offence.'

[3] The Institut de Droit International, in its revision, in 1892, of the Resolutions of Oxford, added the following declaration :—

'Ne sont pas réputés délits politiques les faits délictueux qui sont dirigés contre les bases de toute organisation sociale, et non pas seulement contre tel État déterminé ou contre telle forme de gouvernement.'

[4] In *Reg.* v. *Polti* (Central Criminal Court, May 4, 1894), it was stated that the Italian Consul had refused to provide for the defence of the accused Anarchists on the ground that the prosecution was by the English Government and the matter consequently political.

render the offence non-political. Else the Gunpowder Plot of English history was non-political and Guy Fawkes was not a political offender.

That, however, the Anarchist offences do not fall within the different categories of offences which hitherto have had asylum accorded to them is obvious on a reference to the history of the right of asylum. Taking the date of the Commonwealth of England—or that of the Peace of Westphalia of 1648—as marking the origin of the modern Law of Nations independent *de jure* as well as *de facto*, it will be seen that the cases in which the right of asylum was exercised are divisible into three classes, and arose from dominant facts of the social life of the people of Europe. The first class of cases are those of religious persecution, wherein the States of different sections of the Christian Church extended asylum to fugitives of their respective faiths. The next class comprises the cases of asylum to fugitive slaves—that unanticipated deduction from the Roman Law theory that all men are equal by nature. The last class, the largest, comprises the cases of those revolutionists who endeavoured to introduce on the Continent of Europe political institutions framed on principles of 'constitutional liberty'—that heritage of the Interregnum of 1650 and of the Revolution of 1689.

In every case of asylum the fugitive came to a community which agreed with him in objects always—religious, personal, political liberty—in methods usually. Unless an Anarchist community existed, there could hardly be asylum for Anarchists.

In the case of *In re Castioni*[1], the English Court refused to surrender a fugitive accused of a homicide of a non-combatant. That decision has been commented on as deciding that a political motive is irrelevant in considering the nature of an offence with a view to extradition. All that it decided was that political motive is not all-sufficient—there must also be a political disturbance. It has also been quoted as disposing of difficulties in the interpretation of political asylum. It is clear, however, that facts have created a new set of difficulties. In short, the decision in the *Castioni* case was a genuine interpretation of the existing rule of asylum, as recognized by English Law. The decisions in the Anarchist cases are an attempt to supplement the existing law, by declaring non-political what is obviously the reverse.

It seems simpler and more logical to say that, political or not, offences of the kind are not a subject for the exercise of the right

[1] *In re Castioni*, '91, 1 Q. B. 149, 60 L. J. M. C. 22.

of asylum. How modern much of the right of asylum is may be measured by consideration of the fact that until quite recently the British Government was under treaty-obligation to surrender to Portugal 'rebels or fugitives'—an obligation arising from the Treaty of 1654, concluded by the 'Republic of England,' renewed in 1810.

Progress of International Law.

Among recent developments of International Law, and of that mental basis in the European peoples on which it rests, is clearly traceable a growing sense of the true limits of the law. It is being more clearly perceived year by year that the Law of Nations is the appanage of the community of Christendom—the customary code of the European Family of Nations the world over.

Notwithstanding the terrific growth of European armaments, and the incessant tendency towards fratricidal strife fomented by the warlike spirit and professional militarism in Europe, the increase ever continuing, in the means of communication, while making clearer the race limits of the Commonwealth of civilized States, draws closer the bonds which unite that great republic. The disruptive mental tendencies—religious, nationalist, dynastic—which four centuries ago completed the sundering of that Commonwealth have in much spent their force. The physical obstacles of distance and time, which contributed to that great calamity are now relatively at an end—notwithstanding the subsequent dispersion of European peoples to all quarters of the earth. The Imperial City—whose order we re-arrange, on whose foundations we build—is again taking clear shape in the minds of men.

The immediate signs of the day, indeed, foretell a war among all civilized States of magnitude unparalleled, and of possibilities of scientific destruction impossible to gauge. The formal incorporation into a political Commonwealth of the European peoples, towards which a great writer holds is the tendency of the Law of Nations, seems yet in the distant future[1]. But, as the reaction following on one great war set on a secure foothold the system of Grotius, so we may hope that the mental revulsion which must follow the next great conflict will deepen that perception of the unity of the peoples of which the Law of Nations is the formal expression.

The unity of the Family of Nations in its relation towards races of lower development is illustrated by the series of Treaties which

[1] Bluntschli, in Laurent, Droit Civil International, i. 165.

delimit in Africa the spheres of influence of the Great Powers. It is in a minor degree typified in the policy towards Chinese immigration which now unites the two great branches of the English-speaking community and the Russian Empire. It is typified, too, in the gradual incorporation at Pekin of the Council of Foreign Ministers, which takes joint action in all emergencies which affect European citizens. It is illustrated in the series of agreements and statutes which prohibit the supply of arms to uncivilized peoples. It is further symbolized by the steady policy of all States of the Family of Nations in upholding the shield of exterritoriality over those citizens who reside among non-European races.

The unity of the Family of Nations in its internal relations has had many recent proofs, and it is becoming more clearly perceived that its interest is one, however temporary jealousies may divide. The many International Conventions and International Bureaus recently instituted, testify to a growing perception that the civilized world is one for the protection of civil rights. The spread of Treaties of Extradition testifies to a like perception in regard to more serious inroads on the rights of the citizen. The European Commission of the Danube has become a permanent instead of a temporary symbol of the joint action of Europe. The cessation of consular jurisdiction which follows on the annexation of territory previously in uncivilized hands, testifies to a common reliance on the justice of every State of the Family of Nations. The growing tendency to appeal to arbitration for the settlement of minor differences has been happily crowned by the settled adhesion to that custom of the English-speaking States.

When the truth is universally acknowledged that the Law of Nations is the law of the ruling minority of the earth, many difficulties of its development will be removed from the path. When the truth, of which a British General has opportunely reminded us[1], is brought home to the consciousness of the Commonwealth—that every consideration of justice and humanity calls for the perpetuation of its rule over the inferior races—the outlines of an International Code will be within measurable distance. When the truth, that the maintenance of that rule is of life and death to the European peoples, comes home to the minds of all citizens of the Commonwealth, mental unity will be transmuted into political incorporation.

M. J. FARRELLY.

[1] Lord Roberts, Times, December 4, 1893.

REVIEWS AND NOTICES.

[**Short notices do not necessarily exclude fuller review hereafter.**]

Die Theorie der Exceptionen nach klassischem römischem Recht. Von J. VON KOSCHEMBAHR-LYSKOWSKI. 1ter Band, 1tes Heft: Der Begriff der Exceptio. Berlin: J. Guttentag. 1893. 8vo. xxiii and 174 pp.

THIS is the first Part (Heft I) of the first book of what promises to be rather an elaborate work on the meaning and effect of the Exceptio in the Roman Law. It is a genuine product of a German workshop. It follows somewhat on the lines of Lenel's 'Ursprung und Wirkung der Exceptionen' and a similar treatise by Eisele, but the author has got certain new views upon the subject which he states with clearness and much erudition.

The common view about the Exceptio is that it was first introduced by the praetors, on grounds of Equity, as an indirect means of defence to an action. It was made use of in order to enable a defendant to defeat a claim which, though well founded in law, was liable to material objections which would have made its enforcement inequitable. In other words, the Exceptio, while leaving the plaintiff's right formally subsisting, deprived it of all actual effect. It was made formally operative by the praetors inserting in the *intentio* of the *formula* a direction to the judge to inquire whether there were particular circumstances affecting the plaintiff's claim (e.g. the presence of *mala fides*), and to absolve the defendant if such were proved to exist. This is the notion of the Exceptio which seems to be indicated by Gaius in his Institutes (IV. § 116).

Mr. von Koschembahr-Lyskowski, however, traces the origin of the Exceptio to a more fundamental conception. He holds that it arose out of an early realized distinction between substantive and applied law—between what he calls 'objektives Recht als solches' and 'objektives Recht in seiner Anwendung.' The former of these categories represents the idea of legal institutions theoretically considered—the *ipsum jus*; the latter category is concerned solely with the various means by which claims arising out of such legal institutions may be enforced by the tribunals—the *actiones*.

The principles of the law as such, says the author, though they do generally do not always harmonize with the law in its application; the two may be in opposition to each other. And this want of harmony is shown by the Exceptio. Where the law as such has been left unaltered

in its application the action to enforce it will take full effect; where its principles have been modified or reformed in their application an Exception will be available. In other words, an alteration of the law in its application is effected by the Exceptio. But by the Roman jurists, it is said, it was only 'objektives Recht in seiner Anwendung' that was regarded as of practical importance; substantive right as established by custom or statute was comparatively indifferent to them; it was to the development of the law in its processual form that they devoted themselves. This view of the matter is supported by, *inter alia*, the frequent opposition in the texts between the expressions *ipso iure* and *ope exceptionis*—an opposition which does not depend upon that existing between *ius civile* and *ius praetorium*, because even the Civil Law recognizes Exceptions, as, for example, the lex Praetoria, the Senatus-consultum Velleianum, &c. In short, in the author's view a plaintiff or claimant could only be said to have a positive legal right when he not only had an action but his action was not invalidated by the existence of any Exception.

We cannot say that the arguments by which the author supports his theory are at all convincing. On the contrary the theory, viewed in the light of the texts, leads to numerous difficulties. It is difficult to see, for instance, how the rules as to prescription or compensation, as defences to an action, are to be explained by it. Is it to be said that the plaintiff in an action in which such exceptions exist has no substantive right remaining and that they are to be given effect to by the judge whether pleaded or not? For another thing the logical analysis involved in the distinction between the law as such and the law in its application is much too abstract to have been realized by the Roman jurists of the Republic, who were above all things practical lawyers. Further, it seems necessary for the author's theory to hold that Exceptiones were admitted in the old forms of Quiritarian actions (the *legis actiones*), but of this there is no evidence. No doubt the later statute law, following the example of the praetorian method, introduced particular Exceptions which were to be enforced by the magistrates, in order to render ineffectual in action a right existing under the *Jus Civile*, as in the Senatusconsultum Velleianum and Senatusconsultum Macedonianum, but this was done only occasionally and had apparently no such significance as the author supposes.

In the latter portion of this Heft (pp. 115–170) the author proceeds to apply his general theory to particular kinds of Exceptions, and he takes as an illustration the *Exceptio doli* in its relation to an action based on a *Stipulatio*. In doing so he marks a distinction between what he calls formal-stipulation and causal-stipulation—the former embracing all cases in which the contracting parties had as their sole object the creation of a verbal contract without the presence of any material element inducing it; the latter being based upon some material element such as loan or sale.

In an Index prefixed to the volume the author gives a valuable collection of all the places in the classical sources of the law in which the words *exceptio, excipere, replicatio, replicare, duplicatio, duplicare*, and *triplicatio* are to be found.

On the whole, it must be acknowledged that, while there is reason for doubting the soundness of Mr. von Koschembahr-Lyskowski's views, his work is one of much ability and characterized by thorough acquaintance with the Roman texts and modern literature of the subject.

H. G.

A Treatise on the Foreign Powers and Jurisdiction of the British Crown. By WILLIAM EDWARD HALL. Oxford: Clarendon Press; and London: Stevens & Sons. 1894. 8vo. xv and 304 pp.

THIS is a masterly performance, as might be expected from the author of the standard English text-book upon International Law. It deals with topics which, while of great practical importance, have hitherto been very imperfectly explored, and could indeed be explored to good effect only by one whose previous studies have specially equipped him for the enterprise.

It may perhaps be doubted whether, as a work of art, the book does not suffer from the attempt to comprise in it, probably with a view to rendering it, as far as possible, a complete *vade mecum* for consuls, classes of questions which have little in common. Hence a certain lack of unity, and a somewhat ambiguous title. The 'Foreign Jurisdiction' of the British Crown is well enough known, but what precisely are its 'Foreign Powers'? Mr. Hall explains in an introductory chapter in what sense he uses this term; and we gather that the topics with which he proposes to deal are what we should be inclined to describe as: (1) the machinery which a State is tacitly permitted to organize in foreign territory, for facilitating, or recording, acts performed by, or events affecting, its subjects while therein resident; and (2) the coercive jurisdiction which is expressly conceded to a Western State in Oriental countries, or is assumed by it in uncivilized quarters of the globe. The two things are essentially different, and would best be discussed in separate treatises. If, for practical reasons, they must be dealt with in one and the same volume, it would seem preferable to draw the line between them as above, i.e. between non-contentious machinery and coercive jurisdiction, rather than to distinguish, as Mr. Hall has done, between 'Powers and Jurisdiction of the Crown in States of European civilization,' and 'Powers and Jurisdiction of the Crown in Eastern States, in Protectorates, and in barbarous countries.' The fact is that what Mr. Hall means by the 'Powers of the Crown' are very similar all the world over; while its 'Foreign Jurisdiction' is exercisable only in Oriental and barbarous countries. Mr. Hall's derivation of both species of rights from the well-established right of a State to protect its subjects from ill-treatment is also open to question. The right of a State to insist that its subjects, who, as Grotius says, 'sunt quasi pars Rectoris,' shall everywhere be free from injury, is rudimentary and obvious. But the right to exercise administrative functions in foreign territory is precarious and of comity only, as may be seen in the stringent prohibition to any but German officials to administer an oath in Germany; while the foreign exercise of coercive jurisdiction is derived either from Treaty with an Oriental Power, or from quasi-sovereignty in an uncivilized country. On such points as these Mr. Hall is, however, well entitled to his own opinion, and there can be no doubt as to the value of the information contained in his book, or the skill with which he has managed to give a clear account of very tangled matters. He has had access to unpublished and confidential documents, and has made discreet use of his advantages. He has an admirable chapter upon the strangely misunderstood topic of 'Protectorates and Spheres of influence'; and in a manner which leaves nothing to be desired, and has never before been attempted, he discusses every question with reference to the British Constitution as well as to the Law of Nations. The Appendix contains the relevant Acts of Parliament and some of the Orders in Council. Besides a general index, there are indices of Statutes, of Orders in Council, of Cases and of Treaties. T. E. H.

The Laws and Jurisprudence of England and America: being a series of Lectures delivered before Yale University, by JOHN F. DILLON. Boston: Little, Brown & Co. London: Macmillan & Co. 1894. La. 8vo. xvi and 431 pp. (16*s.* net.)

JUDGE DILLON writes in a generous and welcome spirit of piety towards the Common Law and the legal antiquities of the mother-country, and is abundantly courteous in acknowledgment and citation of English lawyers' work. Besides this, he wins the sympathy of the present reviewer at all events by relegating to a very subordinate place the bare and bald analysis with which the name of Jurisprudence has been too much bound up in England for the last generation or more. He rightly vindicates as the field of Jurisprudence the whole scientific treatment of law: nothing more, therefore not speculative ethics or politics; but also nothing less. We should think well of such a book as a whole even if we thought less well of it in detail. Let us hasten at once to say that Judge Dillon is anything but an unpractical jurist. He has administered both Federal and State laws, and is the author of a well-known treatise on municipal corporations.

This book is intended, in the first place, to give American students a taste for the history of our system, 'our law in its old home,' as well as to introduce them to the general lines of its American development. So far as we can judge, it is excellent for those purposes. It does not profess to be, as it could not be, specially adapted for English purposes: but English students may consult many parts of it with advantage, and matured English lawyers who wish to revive their antiquarian memory, or to put themselves at the point of view of a thoughtful modern American, will find it pleasant and profitable reading. Our judicial system and the Inns of Court are treated with a light hand, but with adequate knowledge of things both new and old; and the remarks on such practical topics as trial by jury and the possibilities of codification carry a greater weight of well-considered experience than will be found in them, perhaps, at first sight by unprofessional readers, or even by lawyers who have never tried their own hand at this kind of exposition.

The learned author believes in trial by jury, but regrets the extreme narrowing of the functions of the Court which has been introduced by the statutes and constitutions of some American States. Few English lawyers will differ with him on this point. He is also an advocate for progressive and cautious codification, a subject on which American opinion is still much divided. The premature and over-ambitious New York Codes have, in our opinion, done much to perplex it with irrelevant matter. Judge Dillon complains that the habit of submitting to the Courts printed 'briefs' which are really elaborate arguments is causing oral arguments to degenerate. This is an evil of which we have not much experience here. If with us anything tends to leave no room for the arguments of the Bar, it is the oratory of aggrieved plaintiffs in person. St. Paul cannot have been acquainted with the female plaintiff in person; otherwise he would perhaps not have limited his censure to speaking in the church. There are some good illustrations of the scale on which American business has to be done. Men often go a thousand miles to argue a case; and Judge Dillon mentions one case in his own experience where opposing counsel from the extreme East and the extreme West met by special trains at Santa Fé in New Mexico, the full text of the pleadings having been sent on by telegraph.

It may be worth while to point out a few small slips. The Common Law cannot be said to supply the rule of action 'in all the British colonies and

possessions.' One notable exception, the Province of Quebec, is not so very far from Yale. It is true that English criminal law prevails almost everywhere, even where some other system of civil redress wholly or partly holds the ground, and that English judicial methods and the authority of decided cases have prevailed (we believe) without exception. It is not strictly correct to say that Bacon's scheme for restoring official reports 'bore no fruit.' The fruit, such as it was, was Hetley's Reports (see Wallace on the Reporters, ed. Heard, p. 270). On p. 214 *Judean* is misprinted for *Indian* in a familiar quotation.

F. P.

The Law relating to Shipmasters and Seamen. By JOSEPH KAY, Q.C., Second Edition, by the Hon. JOHN WILLIAM MANSFIELD and GEORGE WILLIAM DUNCAN. London: Stevens & Haynes. 1894. La. 8vo. xcvi and 825 pp.

THIS second edition is a distinct improvement upon the first. In the first place it consists of one volume, and that not too large for handling, instead of, as in the first edition, two volumes. In the second place Mr. Kay's practice of printing Acts of Parliament and commentary in one and the same type has been very wisely departed from. The words of an Act of Parliament have a virtue and too often a meaning which no other words can possess, and no more serious defect can exist in a legal text-book than the possibility of mistaking the words of the commentator for those of the statute. The book purports to relate to shipmasters and seamen; but it contains, necessarily, a great deal of statute and other law that concerns merchants and shipowners perhaps more directly than shipmasters and seamen. The literature of Shipping law presents the peculiarity of possessing three or four standard works of authority, and some of them of exceeding bulk, which profess to deal with Merchant Shipping law generally; yet almost every chapter of these works is the subject of one or more distinct treatises, some of which are not less well known than the great standard works from Lord Tenterden's 'Abbott on Shipping' downwards. In this state of things it is inevitable that the labours of the various authors should cover a great deal of ground that is common to all of them.

The subject of codification is one upon which every writer on Shipping law has something to say. The introduction of a codifying Merchant Shipping Bill into the House of Commons in August, 1893, seriously interfered with the production of Messrs. Mansfield and Duncan's work at the time when it was ready for publication. That bill has not yet become law, and in the existing state of the political atmosphere there is no certain prospect of its becoming law within any definite or measurable time. A wise discretion was exercised by the editors and publishers of the new 'Kay' in not waiting for its appearance upon the Statute Book. The Merchant Shipping Act, 1854, contains 548 sections, and is one of the longest Acts of Parliament now in existence; yet it passed through Parliament in a very short time. Things are altered now, and the codification of the innumerable Acts that have been piled upon the great work of 1854 will probably not be accomplished so easily.

Authors and editors of works upon Shipping law have a responsibility that is, perhaps, not generally appreciated in this country. Every English colony, almost every port in all the world where British ships resort, is more directly affected by the Merchant Shipping Acts than by any other class of Acts passed by the Imperial Parliament. It is not too much to say

that these Acts, without text-books to guide one through them, are a trackless wilderness; and, what is worse, the statutes themselves are not always to be had in colonial ports. Nevertheless they have to be administered in every British colony as frequently and as exactly as they are administered by the police magistrates in London. The value of a 'Kay upon Shipmasters and Seamen' in such places is inestimable. And not only the words of the statutes, but the words of commentators, receive necessarily in the outlying regions of the British Empire an attention and acquire an authority that would perhaps surprise their authors. It is all the more necessary, under these circumstances, that statutes and commentary should appear, as they do in the second edition of 'Kay,' in different type. One other improvement we notice in the new 'Kay.' Far more care is taken in stating in the text itself, where the words of a standard work are used to enunciate the law, the name of the author to whom those words belong. In the first edition this was not always the case. The luxurious bulk of the first edition has necessarily been much curtailed; but not, so far as we have discovered, at the expense of matter, but only of margin and 'spacing.' The old 'Kay' was one of the most extravagant volumes in this respect throughout the whole of modern legal literature.

It is almost presumptuous for the reviewer of a book that represents the amount of labour which has been expended upon 'Kay' to express more than a general opinion of the character of the work in respect of its accuracy and completeness. The experience of practitioners must be the ultimate test in such matters. The criticisms we had noted are exceedingly minute. It is doubtful whether (p. 568) the proceeding *in rem* was the ancient foundation of a salvage suit. Salvage was probably awarded by way of a *quantum meruit* by the common law courts before the proceeding *in rem* was heard of and before an Admiralty Court existed. 'No admiral' (p. 608) 'shall as such . . . . take . . . . any wreck.' These are the words of a statute, and at one time had a very real meaning. Now they are of doubtful import, and without some historical explanation are somewhat ambiguous. Only one misprint we have found, 'no' for 'on' (p. 588). Owners appearing in a collision action *in rem* in Admiralty cannot be made liable, except for costs, 'beyond the value of ship and freight' (p. 521); it may be doubted whether *The Dictator*, 1892, P. 304, does not affect some of the decisions upon which this statement is founded. A stationary vessel will be in fault for a collision at night if she has no light up; and that although the other ship might have avoided her. This is not quite clear from the statement at p. 512. The 'ancient' law of the Admiralty is referred to (p. 523), and elsewhere as a recognized and known code or system. In the absence of reports and authorities from contemporary documents as to what law the Admiralty Court really did administer before the beginning of the present century, we doubt whether it is safe to state what the ancient law of the Admiralty was. There is reason to suppose that the rule of division of loss in case of collision was, like the married women's restraint upon anticipation, an 'invention,' not indeed 'of the Chancellors,' but of the Admiralty judges in not very remote times. We should advise a master, though 'bound foreign,' to see to his hand lead-line before his deep sea line (p. 62); but it is impossible and perhaps misleading to specify the matters which a master has to attend to in connexion with the equipment of his ship. It would not be out of place to warn those who are responsible for writing up a ship's log that entries made *before* an event are still less reliable than entries made long after it. It is not an unknown practice for the routine entries to be made long in advance of the event. In the C. S. Butler

(p. 544) the craft in question was not a Thames lighter generally so called, but a Trinity House sailing ballast lighter.

The nature of these observations will show that a perusal of the new edition of 'Kay' has supplied nothing but minute points for criticism. The conclusion arrived at is that Messrs. Mansfield and Duncan have done an exceedingly laborious work with great accuracy and completeness.

The Sale of Goods Act, 1893, *including the Factors Acts,* 1889 *and* 1890. By His Honour Judge CHALMERS. London: W. Clowes & Sons, Lim. 1894. (10*s.* 6*d.*)

THERE can be no such thing as an authorized exposition of an English statute save by the judgment of a Superior Court. But if there could be, then Judge Chalmers would be the best authorized exponent, as he is in substance the author, of the Sale of Goods Act. Much of the work is of course identical with the learned Judge's Digest published a few years ago, which was founded on the bill as it stood at an earlier stage. This being so, there is no great occasion for critical comment. Every one who expects to have much to do with commercial cases will provide himself with the book as a matter of common professional prudence. It does not profess to supersede the fuller treatises; e. g. the decisions on s. 17 of the Statute of Frauds, now replaced by s. 4 of the principal Act, are relegated to the Appendix, and are there dealt with only in a summary way. Note A. in Appendix II. on the use of the terms Contract, Condition, and Warranty, was partly foreshadowed in a paper read by Judge Chalmers at the Oxford Law Club, and printed in this REVIEW in 1892. It will be found of considerable interest. The reader will not fail to note the learned author's warning in the text (p. 21) that 'many stipulations which are commonly spoken of as warranties are really conditions precedent, and have always been given effect to as such.'

We do not think we trespass beyond the bounds of fair comment on matters of public interest in congratulating Judge Chalmers, as we are sure the whole profession does, on his recovery from the accident which lately befell him at Gibraltar, and which, serious as it was, might easily have been worse.

The Law relating to Parish Councils. By GEORGE HUMPHREYS. London: Stevens & Sons. 1894. 8vo. xxxix and 412 pp. (7*s.* 6*d.*)

The Local Government Act, 1894. By WALTER C. RYDE. London: Reeves & Turner. 1894. 8vo. xxxvi and 288 pp. (7*s.* 6*d.*)

THE Local Government Act of 1894, whatever its merits or defects, will at any rate not suffer from a want of guides to its interpretation.

The title of Mr. Humphreys' book is likely to be popular, though it does not sufficiently comprehend the whole of its subject-matter, viz. the Local Government Act 1894. It contains the relevant sections of a large number of statutes (several being printed *in extenso*), as well as the various circulars and orders of the Local Government Board up to the end of April, and to this its somewhat bulky form is to be attributed. When it is remembered, however, that the present statute incorporates portions of about thirty other Acts of Parliament, it cannot be said that the considerable space which the

author has devoted to bringing some of these together has been in any degree wasted. A short sketch of the scheme of Local Government before and after the year 1888 would have rendered the scope of the present enactment more intelligible to the mind of the lay reader. The volume is not overburdened with notes, but by means of frequent cross-references the Act is left as far as possible to explain itself by itself. The author indeed, while doubtless trying to avoid any appearance of captious criticism, has somewhat ignored the difficulties of interpretation which must arise in the practical working of a statute which inaugurates such far-reaching changes in the administration of rural affairs. Various questions present themselves as to the position of chairman. If, for instance, under section 3 (8) the chairman of the Parish Councillors is not elected from their own body, will the full number of the members of the Council exceed by one the maximum number to be fixed from time to time by the County Council under section 3 (1)? No notice, again, is taken of the apparent inconsistency between section 1 (1), which (as amended) determines that every rural parish with a population of 300 or upwards shall have a Parish Council, and certain other sections of the Act, where the words 200 have been left unamended by Parliament instead of 300. The index is full and accurate, but on the other hand the want of any index to the numerous statutes referred to in the text and notes, and a similar want as regards the cases cited, are rather serious defects.

Mr. Ryde's edition compares favourably with many of its many rivals in point of careful editing and general utility. The short introductory chapter, while attempting nothing in the way of general criticism, is as lucid as the intricate nature of the subject will permit. In a work intended for the use of laymen as well as lawyers, a little more might have been said on the novel power conferred on the Parish Councils of hiring land for allotments, and also as to the duties and liabilities of the trustees of public property and charities, who are to take the place of the present overseers. It is a little unfortunate that the early appearance of the volume in print prevented the inclusion of the various circulars of the Local Government Board which have been issued to the County Council and to Town Councils of County Boroughs, as to the powers and duties which devolve on those respective bodies for the purpose of bringing the Act into operation. The order of the Local Government Board of the 27th of April last, containing regulations as to inquiries and notices during 1894, is omitted for the same reason. There is a fairly full index, but separate references might have been included to such important subjects (among others) as voting, expenditure, qualification, and illegality, without adding unduly to the number of its pages. The note on section 14, subsection (3), as to the appointment of additional trustees, is hardly as clear as it might be, and there would seem to be no reason for the doubt expressed as to whether the appointment given to the Parish Council under that subsection is vested in the parish meeting, where there is no Parish Council under section 19 (5).

The Law of Principal and Agent. By ERIC BLACKWOOD WRIGHT. 1894. London: Stevens & Sons, Lim. 8vo. xl and 428 pp. (18*s.*)

SEVERAL more or less excellent reasons are adduced by the author in the Preface in justification of his bringing out a fresh treatise on the Law of Principal and Agent. This—for the present, at least—is one of the subjects for the Bar examination, and the work may thus justify its existence as

a text-book, though it is more likely to be of use to the practitioner than to the student. The principal argument, however, in favour of the present volume is that the second edition of Mr. Evan's work issued in 1888 is the last on the subject. Since then not only have many fresh judicial decisions been given and doubtful points cleared up, but the industry of Parliament has produced several new statutes, such as the Factors Act of 1889, the Gaming Act of 1892, and the Married Women's Property Act of 1893, which affect the law of agency in several particulars. The relevant portions of these enactments are given in the appendix, and the Sale of Goods Act of 1893—the most recent instalment towards the formation of a code—is given *in extenso*. The author's style is commendably clear and precise, and his criticism of the various definitions of the term agent, which he brings together in the introductory chapter, is logical and exact. The question of commission agents is well dealt with, and the group of cases connected with the subject are of especial value, as several which are only reported in the Times Reports are not found in other text-books. Among these are the recent cases of *Alexander* v. *Davis*, 2 Times Reports 142, *Henry* v. *Lowson*, 2 Times Reports 199, and *Noah* v. *Owen*, 2 Times Reports 142, as to the right to revoke a commission agent's authority, and terminate his employment without notice, a matter we should have thought to be clear on principle, though repeated attempts have been made to question it in the Courts. The chapter on the authority of an agent contains a useful summary of the law as regards auctioneers. There is a slip on page 9, where the author, referring to the general incapacity of married women to contract as affected by the Married Women's Property Act, 1882, says, 'She can now bind herself only if she has separate estate at the time of entering into the contract,' and so forth. But by the Married Women's Property Act, 1893 (with which the author deals on the next page), it is expressly provided that every contract thereafter entered into by a married woman otherwise than as agent, 'shall be deemed to be a contract entered into by her in respect to and to bind her separate property whether she is or is not in fact possessed of or entitled to any separate property at the time when she enters into such contract.'

There are a few typographical errors, as, for instance, where the name of the author of the Act, 30 & 31 Vict. c. 29, is given in some places as Leman instead of Leeman. The case of *Henry* v. *Lowson* again is reported in 2 Times Reports, not at page 142—as is printed in the Table of Cases—but at page 199. These trifling defects, however, do not seriously detract from the usefulness of the work, which is practical and well arranged throughout, contains an excellent index, and fairly covers the whole of the ground with which it proposes to deal.

The Corrupt and Illegal Practices Prevention Act, 1883 (46 & 47 Vict. c. 51). With an Introduction, and notes of all judicial decisions under the Act. By Ernest A. Jelf. London: Sweet & Maxwell, Lim. 1894. 8vo. xvi and 179 pp. (5*s.*)

Mr. Jelf has here reprinted a paper on the Corrupt Practices Act, which originally appeared in the Law Times, as an introductory chapter to an annotated edition of the Act itself.

The notes are full and clear, and the book supplies much useful information in a compact and convenient form. The introductory chapter contains an excellent account of the objects of the Corrupt Practices Act, the methods

adopted for attaining those objects, the criticisms to which the provisions of the Act have been subjected, with an estimate of their practical justification. It were much to be desired that writers on legal subjects, especially where those subjects are technical and largely depend upon statutes and the construction of statutes, would do as Mr. Jelf has done, and give the reader a clear notion of the general bearings of the matter in hand, before plunging him into a maze of statement and comment. Mr. Jelf has done well to call attention to the great injustice which may be suffered by a respondent where the real mover in the petition puts up a man of straw as the ostensible petitioner. The maintainer of the suit must find a deposit of £1000, and must of course pay the expenses incident to his own case, but by multiplying allegations of corruption he may put the respondent to an enormous expense, and if the charges are unfounded the only source from which this may be recovered is the nominal petitioner, who is not worth powder and shot.

The note on the Parliamentary law as to agency is not so satisfactory as the introductory chapter. Mr. Jelf does not distinguish—indeed, he hardly seems to grasp the distinction—between the liability arising from the fact of employment and the authority given to an agent to employ others on the candidate's behalf. Whether the candidate is liable or not to suffer for the corrupt or illegal act of his supporter must depend on the fact of employment of the wrongdoer by the candidate, and this again may depend upon the extent of authority which the candidate has expressly or impliedly given to an agent to engage others to work for him. But in five cases out of six in which the word 'agency' occurs in this excursus, it would be infinitely better to use the word 'employment.' It is unfortunate that the English language supplies no handy expression for 'the person employed.' For the so-called agent is in most cases a person employed to do certain work, and is certainly not invested with an authority to do it unlawfully.

It would be especially convenient in a book of election law that dates should be affixed to the cases cited.

Juridical Equity. Abridged for the use of Students. By CHARLES E. PHELPS. Baltimore: E. Curlander. 1894. 8vo. xxxii and 436 pp.

MR. PHELPS modestly calls his book a hornbook, because its aim is to deal with the few central principles of equity. But we think he could have followed no better plan than this 'elementary' one, whether he meant it for students or practitioners. The best exponents of the law whom we have known have always adopted this system, that of *petere fontes.* To group illustrations around the elementary principles is the second thing. At this point most men who write books stop. Mr. Phelps goes further, enlivening his pages with references to much modern literature which is in no law library. Not content with referring on a single page to Bacon, Sir John Seeley, and Pascal, he cites the Pickwick Papers on oaths at half a crown apiece, and on the next page quotes a phrase of Carlyle's. We have no sort of quarrel with this way of writing a book. Indeed we think it an excellent plan which might be widely followed. It would certainly attract many who are now repelled by legal text-books. Mr. Phelps writes clearly, ably and well, wisely giving the bulk of his space to the jurisprudence, the remainder to the procedure, of equity. It is too late in the day to complain of the tiresome system which prevails across the water of referring, not to pages, but to paragraphs. But we think it inconsistent for the table of cases to

refer to the pages, while the index of the book refers to the paragraphs. And it is surprising to find 'Meeson and Welsby, Law Reports of,' as one of the heads in Mr. Phelps' index.

An Inaugural Lecture on the fate of the Roman Law north and south of the Tweed, delivered at All Souls College, by HENRY GOUDY. London: Henry Frowde. 8vo. 33 pp. (1*s*. net.)

IN Scottish legal history we bow to the authority of Mr. Bryce's successor at Oxford, who comes from the chair of Roman Law at Edinburgh. In his English history we cannot accept the Romanizing view which he favours. With regard to the Germanic view which prevails among English scholars he observes, 'Nothing like this happened elsewhere in Europe.' Exactly so. In what part of Europe other than England were laws issued in the vernacular before the twelfth century? The example of Ireland will rather confirm than weaken the Germanic case. And on the Romanizing hypothesis, as Mr. Freeman once said to the present writer, 'Where is your English Gregory of Tours?' And as to the supposed keeping alive of the civil law by churchmen who were 'allowed their own judicature and their own procedure,' surely Prof. Goudy knows that there were no separate ecclesiastical courts before the Norman Conquest. It is true, however, that the state of early English ecclesiastical law and its relations, e.g., to the Theodosian code stand in need of further investigation. Then, after the Conquest, so far from the authority of Bracton 'in the law courts and with subsequent text-writers' being 'generally admitted,' as Prof. Goudy expects it to be, it is a commonplace of English legal history that Bracton is not an authority in our law. Moreover, no one who has studied Bracton can fail to recognize that, whenever there is a real conflict between Roman and Germanic law (take for a striking example the sale of goods), Bracton sends the Roman rules to the wall without hesitation. Prof. Goudy has taken up what we cannot but think a hopeless adventure. Woden and Thor are too strong for him. But the vanquished Roman cause could not desire a better Cato.

We have also received:—

The Anglo-Saxon 'Township.' By W. J. ASHLEY. Reprinted from the (Harvard) Quarterly Journal of Economics. 8vo. 19 pp.—Mr. Ashley's first point is that *township* = *villata*, the men not the place, in its primary meaning. We are not aware that any one has asserted the contrary, but Mr. Ashley is entitled to the credit of having emphasized a correct if not very important proposition. Another point is that *villa* was not a mere translation of *tun*, but a real concurrent equivalent. This depends on the much larger question whether any one, outside a limited number of learned religious persons, habitually spoke Latin in Britain (not to say England) after the Roman occupation. We are open to persuasion, but not persuaded. Then Mr. Ashley proceeds to minimize the functions of the Anglo-Saxon township. He is of course aware that for some years past the notion that there was a judicial township court has been generally abandoned (e.g. Sir F. Pollock's Oxford Lectures, p. 130). And Dr. Stubbs wrote long ago (Const. Hist. i. 84, 1st ed. 1874): 'That the markmoot was a court of justice, as Kemble conjectures, seems altogether improbable.' Again he

distinctly says of the vill that 'it is capable of holding assemblies . . . but it is not a court of justice' (3rd ed. p. 54). On the other hand we are not at all disposed to think with Mr. Ashley that the words 'with witness of his township' in the laws of Edgar do not mean anything formal. Taking witness was a perfectly formal act down to the Norman Conquest; casual talk to one's neighbours would by no means do as well. That the reeve and four men, in the laws of Henry I, appear in the county court as subordinate to the lord and his steward is quite true. What is remarkable in the early twelfth century is that they should still be there at all. See also in Domesday, i. 179, 269, &c. for the duty of suit to shiremoot and hundred on pain of fine, and cf. Stubbs, Const. Hist. i. § 50.

Bourdin's Exposition of the Land Tax. Fourth Edition. *With a new and exhaustive index* by the late FREDERICK HUMPHREYS, *and digests of the cases decided in the Courts* by CHARLES C. ATCHISON. London: Stevens & Sons, Lim. 1894. Sm. 8vo. xii and 228 pp. (7*s.* 6*d.*)—This well-known book has been carefully edited and brought up to date. *Regina* v. *The Land Tax Commissioners for the Hundred of Ivychurch, Kent*, heard on Feb. 19, 1894, is actually included in the Digest. The position of the editors, both being deputy registrars of Land Tax, gives them considerable practical knowledge of the working of the Acts, and we are of opinion that the present edition quite maintains the character of the book. The full index, the tables for computing the consideration money payable for the redemption of land tax, and the very full head-note which precedes the judgment in each of the cases given in the appendix, are new features in the book, and will be useful to the practitioner.

The Trustee Act, 1893. By ARTHUR LEE ELLIS. Fifth Edition. 1894. London: Stevens & Sons, Lim. 8vo. xii and 156 pp. (6*s.*)—Mr. Ellis has furnished the profession not only with a well-printed copy of an important statute, but has appended to each section a short *résumé* of the law relating to the subject of it. Without being, or indeed, as he himself points out in the preface, without pretending to be, exhaustive treatises, these statements of the results of the authorities are, so far as they go, clearly and accurately expressed. The book, the popularity of which is shown by its speedy attainment of the honours of a fifth edition, also contains schedules affording authenticated information as to dividends and other particulars of securities authorized by the Act. It would assist practitioners if in future editions Mr. Ellis were to include a table showing which sections of the repealed enactments correspond with those of the consolidating statute.

Indermaur's Manual of the Principles of Equity (3rd edition. London: Geo. Barber, 'Law Students' Journal' Office. 1894. xxiii and 481 pp.) is a handbook of equity for students, an edition of which apparently lasts four years. Mr. Indermaur has been at pains to make his statement of the distinctive principles of equity short, which is a far more difficult thing to do than to write at length. His illustrations are well chosen from among the modern cases which are most likely to stick in the student's memory. He is up to date: witness his citation of the Lands Allotment Company's case, deciding that directors are trustees who can now plead the Statute of Limitations. Taught by a large experience, his effort has been to make his book more explanatory and more comprehensive. And we do not see that this effort has in any wise failed. His book has no great claim to originality. It is a good business-like exposition of a large subject in manageable compass for the use of students who seem to value it as it deserves,

Ruling Cases, arranged, annotated, and edited by ROBERT CAMPBELL. With American Notes by IRVING BROWNE. Vol. I. Abandonment—Action. London: Stevens & Sons, Lim. Boston, Mass.: The Boston Book Co. La. 8vo. xxix and 829 pp. (25*s*. net.)—This handsome volume promises well for the excellence of the series which are to follow. The alphabetical arrangement of subjects is intended to combine the advantages of a selection of cases with those of a digest, and comprises all kinds of topics both of Common Law and Equity. The 'ruling' cases seem to have been well and carefully chosen: but we do not understand why the most important American decisions have not been admitted on the same footing as English ones. To men who are without large libraries the series will no doubt be of great service. Practice cases are included (e.g. under the title 'Abandonment'): it seems doubtful whether these can be of extensive utility in a work intended for the American as well as the English market.

Précis de Droit international public ou droit des gens. Par R. PIEDELIÈVRE. Paris: F. Pichon. 1894. 603 pp.—This is the first volume of a new book on International Law. It deals with the relations of states with each other in time of peace. If the second volume is to be devoted to their rights and duties in time of war, the latter will enjoy proportionately fuller treatment. Many books have appeared in France during the last few years on International Law, which (public as well as private) is now a compulsory subject in French legal education. A consequence of this is that every legal faculty has its courses of public and private international law, and the lecturers publish a book on the subject as a matter of course. Some of them are accurate, others inaccurate compilations. A few are of better quality. Among these is that of M. Piedelièvre.

Etudes de droit international conventionnel. Par LÉON POINSARD. Paris: F. Pichon. 1894. 600 pp.—This is the first volume of a treatise on the international arrangements by which a number of matters have of late years been regulated. The present volume deals with carriage by sea, railways, posts, telegraphs and telephones, treaties of commerce, coinage, weights and measures, copyright and patents, designs and trade-marks. The author is in a good position, as general secretary of two International Unions, to deal comprehensively with such a subject.

The Sale of Goods Act, 1893. With Introduction, Notes, and Index by J. M. LELY and W. F. CRAIES. London: Sweet & Maxwell, Lim.; Stevens & Sons, Lim. 1894. (1*s*.)—This is the second of a series of cheap annotated editions of important Acts. As the publishers put it, 'for a small annual subscription (10*s*.) the subscriber will be kept up to date in the legislation of the year.'

The Revised Reports. Edited by Sir F. POLLOCK, assisted by R. CAMPBELL and O. A. SAUNDERS. Vol. XIV. 1812–1815. (1 & 2 Dow; G. Cooper; 16 East; 1, 2 Maule & Selwyn; 4, 5 Taunt.; 3 Camp.) La. 8vo. London: Sweet & Maxwell, Lim. Boston, Mass.: Little, Brown & Co. 1894. xviii and 886 pp. (25*s*.)

Outlines of the law of Torts. By RICHARD RINGWOOD. Second Edition. London: Stevens & Haynes. 1894. 8vo. xli and 253 pp. (10*s*. 6*d*.)—Review will follow.

The Protected Princes of India. By W. LEE-WARNER. London: Macmillan & Co. 1894. 8vo. xix and 389 pp.—Review will follow.

The Law of Patents. By HENRY CUNYNGHAME. London: W. Clowes & Sons, Lim. 1894. 8vo. lxxiv and 635 pp. (25*s.*)—Review will follow.

The Student's Guide to Procedure in the Queen's Bench Division and to the law of Evidence. By JOHN INDERMAUR and CHARLES THWAITES. London: G. Barber. 1894. 8vo. 97 pp. (5*s.*)

The Law of Trade-Marks, Trade-Name and Merchandise Marks. By D. M. KERLY. London: Sweet & Maxwell, Lim. 1894. 8vo. xlviii and 752 pp.

A Practical Treatise on the Criminal law of Scotland. By J. H. A. MACDONALD. Third Edition by the author and N. D. MACDONALD. Edinburgh: W. Green & Sons. 1894. 8vo. xv and 652 pp. (31*s.* 6*d.*)

The Law of District and Parish Councils, being the Local Government Act, 1894. By JOHN LITHIBY. London: Effingham Wilson. 1894. 8vo. xii and 515 pp.

Cases on Constitutional Law. Part I. By J. B. THAYER. Cambridge (Mass.): Charles W. Sever. 1894. 8vo. xi and 448 pp.

The Annual Digest, 1893. By JOHN MEWS. La. 8vo. xxxv and 377 pp. London: Sweet & Maxwell, Lim.; Stevens & Sons, Lim. 1894.

Bill of Lading Exceptions. By HENRY E. POLLOCK. [Hong Kong.] 1894. 8vo. xv and 100 pp.

How to become a solicitor. By T. F. UTTLEY. London: Stevens & Sons, Lim. 1894. 8vo. viii and 184 pp. (5*s.*)

A Manual of the Law and Practice in Affiliation Proceedings. By W. H. BOTT. London: Stevens & Sons, Lim. 1894. 8vo. xi and 158 pp. (7*s.* 6*d.*)

The Editor cannot undertake the return or safe custody of MSS. sent to him without previous communication.

THE

LAW QUARTERLY REVIEW.

No. XL. October, 1894.

NOTES.

WITH this number the LAW QUARTERLY REVIEW completes its tenth volume. It has been thought right, for the convenience of subscribers and others who may wish to refer to back volumes, to issue a complete index of contributors, subjects of articles, and books reviewed, on the same plan which was applied by the late Mr. G. Croom Robertson to the general index to the first ten volumes, and afterwards the whole first series, of *Mind*. This makes it needless to publish a separate index to this volume. We do not think it necessary to take a formal survey of our past work on this occasion; but we must express our thanks to the learned contributors who have enabled this REVIEW to do justice to both scientific and practical topics of legal interest within almost a larger range than we hoped for at first. Having counted among our contributors the late Sir James Stephen, the late Lord Bowen, Lord Justice Lindley, Sir Edward Fry, Lord Davey, Mr. Justice Wright, Judge Chalmers, and Judge Holmes of Massachusetts, such representatives of special branches of learning and applied legal science as Sir Howard Elphinstone, Mr. Challis, and Mr. Ilbert, and in the political and historical borderlands of law such helpers as Sir Alfred Lyall, Mr. Vinogradoff, Mr. J. H. Round, and Freeman, for too short a time the Editor's colleague at Oxford, we should indeed be unreasonable if we were not more than satisfied with the quality of the support we have received. We have the satisfaction of believing that the encouragement of our example had something to do with the foundation of the *Harvard Law Review*, in whose pages have appeared some of the most important additions lately made to our historical knowledge of the Common Law. As for the quantity of interest shown either here or in America in the study of law as a science, there is perhaps room for increase. But let us be thankful for what there is.

F. P.

Where a judge merely follows a reported case his decision adds little, if anything, to the authority of the case, but where he independently arrives at the same conclusion as that reported, the result is very different. An example will make this clear. For simplicity, I will suppose that eighty per cent. of the decisions of each judge are correct. It follows that out of 100 decisions given by *A*, 80 are correct, 20 incorrect. When *B* has the same points before him as *A*, he will decide correctly, and therefore agree with *A* in eighty per cent. of the 80 cases that *A* decided correctly, i.e. in 64 cases; while he will decide incorrectly, and therefore agree with *A* in twenty per cent. of the 20 cases that *A* decided incorrectly, i.e. in 4 cases. The result being that the decisions of *A* and *B* are correct in 64 out of the 68 cases, i.e. 16 out of 17, or about ninety-four per cent. of the cases, in which they agree. H. W. E.

The headnotes of three consecutive House of Lords cases in the Law Reports—*Hamlyn & Co.* v. *Talisker Distillery*, '94, A.C. 202; *Richardson, Spence & Co.* v. *Rowntree*, *ib.* 217; *Hedley* v. *Pinkney & Sons S. S. Co.*, *ib.* 222—exemplify in various degrees all the faults of which we have repeatedly complained, and do not give any sign of improvement. *Hedley's* case is the worst treated, but in none of them is any substantial help given to the reader for ascertaining the real point of the decision.

On the other hand, *Brisbane* (Municipal Council of) v. *Martin*, '94, A.C. 249, applied to a case from Queensland, in Lord Ashbourne's words, 'the settled rule' (as to setting aside the verdict of a jury) 'which has prevailed for a number of years in this country.' It may be good to report such a case in Queensland if the Courts of that colony have not learnt elementary law. There is no reason for reporting it here.

From the judgments in *Hamlyn* v. *Talisker Distillery*, '94, A.C. 202, 6 R. July, 14, the following propositions may be, with more or less certainty, deduced.

First: When a contract is entered into between parties residing in different countries, as for example England and Scotland, where different systems of law prevail, the legal effect of the contract is to be determined by reference to that law, whether English or Scotch, which the parties intended to govern the whole, or it may be a part of the contract.

Secondly: There is no necessity for a contract being governed

wholly by the law of one country. There is nothing, speaking generally, to prevent persons who are entering into an agreement making it part of the terms that as to certain matters the agreement shall be governed by the law of England, and as to certain other matters by the law of Scotland.

Thirdly: The validity and even the legality of a term in a contract often does in fact depend on the will of the parties. This assertion sounds paradoxical and disputable, but if properly understood it is incontrovertible. Persons who enter into a contract under the law of England cannot, it will be said, at their own choice validate agreements which under English law are voidable or void. This is true. But it is also true that the parties to a contract can within certain limits determine what is the law by which their agreement is governed, and therefore can in effect determine whether it be valid or not. The contract dealt with in *Hamlyn* v. *Talisker Distillery* contained an arbitration clause which certainly was invalid under the law of Scotland, and it is perfectly clear that if not the whole yet certainly the greater part of the contract was to be performed in Scotland, but the parties while contracting mainly with a view to the law of Scotland agreed that the arbitration clause should in effect be made subject to the law of England, under which law it was perfectly valid. They therefore in effect determined that the arbitration clause, which is not opposed to any rule of English law, should be valid.

Fourthly: No country can be called upon to enforce rights, the enforcement of which is opposed to the policy by which is meant the broad fundamental principles of the law of that country.

None of the principles established or confirmed by *Hamlyn* v. *Talisker Distillery*, '94, A.C. 202, 6 R. July, 14, are new. They are well known to every person versed in English decisions as to the conflict of laws. But their authority is greatly strengthened by their being definitely propounded in a case decided by the House of Lords. The utterances of their lordships moreover form an admirable example of that kind of judicial exposition in which English lawyers, when taken at their best, excel. There is nothing more curious and from one point of view more important than the contrast between the marvellous ability with which English judges apply and expound the general principles necessary for the decision of a given case, and the equally astonishing narrowness with which they often interpret statutory enactments. The main reason for dreading codification is the fear that our judges should decline to treat a code as a body of principles and look upon

it as they generally do upon a statute, as a series of rules which admit only of the strictest verbal interpretation.

How far is a passenger travelling by a railway or on board a steamboat bound by conditions written on or referred to by his ticket when he has in fact never read them? The decision of the House of Lords in *Richardson &c.* v. *Rowntree*, '94, A. C. 217, gives at least a partial, and as far as it goes a satisfactory reply to this question. A traveller is not bound by conditions which, when he takes a ticket, he does not know to exist and to which his attention is not directed by the company in a reasonably sufficient manner. When we allow for the tendency of juries to sympathize with every traveller who has suffered damage in person or property through the real or supposed negligence of a company, we may perhaps assume that the doctrine laid down in *Richardson* v. *Rowntree* will protect travellers by land or sea from any gross injustice. Still it must be admitted that the power of companies and other carriers to exempt themselves from liability for negligence often leads to unsatisfactory results and is not based on any very clear principle. It is almost idle to treat the matter as one of contract. A passenger when going on board a steamship never really knows the terms of the contract into which he is supposed to enter. More than this, he is not in a position, if he knew and had read every condition printed on or referred to by his ticket, to bargain with the steamship company. No man probably will be found who has declined to take a ticket, say for a passage from London to Boulogne, because when he received it he discovered that the conditions were too favourable to the company whose steamer he was entering. Perhaps it would be better if the legislature set aside in these cases all reference to contract, enacted specifically what should be the liability of carriers, and prohibited so-called contracts by which statutory liabilities were evaded.

The actual decision of the House of Lords in *Palmer* v. *Wick and Pulteneytown Steam Shipping Co.*, '94, A. C. 318, 6 R. Aug. 39, that the rule or supposed rule in *Merryweather* v. *Nixan*, 8 T. R. 186, 16 R. R. 810 as to contribution between wrongdoers does not in any case apply to Scotland, has not much interest in itself for lawyers south of the Tweed. But the remarks made on *Merryweather* v. *Nixan*, especially by Lord Herschell (see '94, A. C. at p. 324, 6 R. Aug. 43), leave it pretty clear that in England the true rule is, as was laid down by Best C.J. in *Adamson* v. *Jarvis*, 4 Bing. 66, that contribution between wrongdoers is

excluded only in 'cases where the person seeking redress must be presumed to have known that he was doing an unlawful act.'

In *Arrow S. S. Co.* v. *Tyne Commissioners*, 6 R. Sept. 1, the House of Lords grazed, so to speak, the high, grave, and dubious question whether a man can by the common law so fully disclaim and abandon his own goods that they cease, by the mere declaration of his will, coupled or not coupled with a physical act equivalent to jettison, to be in any sense his property. We humbly conceive the true doctrine to be that possession of goods is never absolutely vacant in law, and that an express abandonment is, in point of law, merely a licence to the first man who will to take the goods for his own; which taking will be justified and will finally change the property if complete before the taker has notice that the licence is revoked. Compare the authorities as to gifts without delivery discussed in L. Q. R. vi. 446. Whether this doctrine (statutes apart) would apply to a ship on the high seas is another matter. In itself we believe it to be as rational as any other doctrine.

The law as to reduction of a company's capital illustrates the anomalous mode in which our law is made. The Companies Act says nothing about such reduction. Then a special Act is passed, the Companies Act, 1867, dealing with it. This Act receives a construction from an eminent commercial judge, Jessel M.R., which makes it a dead letter. So the Companies Act, 1877, is passed to resuscitate, explain and amplify the prior Act. This begets fresh judicial difficulties, and now after 32 years of confusion and contradiction, we have the House of Lords reversing the Court of Appeal (*British and American Trustee Corporation* v. *Cowper* (42 W. R. 652)), on the elementary question whether a company can reduce its capital by buying in its own shares. As a general proposition it is quite well settled that a limited company cannot apply its funds in this manner. It would be an easy way of making the company's capital a mere sham. The fallacy which the Law Lords have just exposed lay in supposing that because a company cannot buy its own shares, and so reduce its capital, it cannot on reducing its capital in the authorized way adopt as a mode of reduction the buying up of its own shares. Present creditors are safeguarded by the machinery for reduction, and for the future the company starts trading afresh with its reduced capital duly advertised. Lord Macnaghten's words disapproving of *Hutton* v. *Scarborough Hotel Co.* (No. 2) (2 Dr. & Sm. 514, 521) deserve by the way careful attention.

Three citizens of Sydney out of four (to which number the scarcity of white labour seems to have brought Australian juries) were of opinion that the term 'Evening Ananias' was a mere playful reference by a Sydney evening paper to a contemporary, and could not be reasonably understood as imputing wilful and habitual falsehood to the manager of the paper so designated. The Lords of the Council were of opinion (*Australian Newspaper Co.* v. *Bennett*, 6 R. Sept. 36) that this finding was within the legitimate province of a jury. Perhaps there is not much law in the case: but it is a fresh example of the unwisdom of bringing speculative libel actions upon words of mere chaff or banter. Courts of law are not tribunals of literary taste.

When the defence of communication on a privileged occasion is set up in an action for libel, the question is whether there was a privileged occasion at the time and place of publishing the words complained of, not what were the circumstances at the time and place of the original writing. Those who make statements of a defamatory nature with the honest purpose of furthering some lawful public or private interest must see at their peril (in case the statements cannot be absolutely justified) that they do not communicate them to some one who is a stranger to the occasion. So the Court of Appeal has held in *Hebditch* v. *MacIlwaine*, '94, 2 Q. B. 54, 9 R. July, 204, expressly overruling *Tompson* v. *Dashwood*, 11 Q. B. D. 43, 52 L. J. Q. B. 425, which, as we said three years ago, we have always thought wrong.

Can an ambassador accredited to the Crown give our Courts jurisdiction over him by submission?

This question resolves itself into two inquiries, to neither of which is it so easy as might be expected to give a decided answer.

First: Can an ambassador give our Courts jurisdiction to entertain an action against him by appearing without protest?

It is natural to answer this question in the affirmative. English judges have certainly intimated that a sovereign can submit to the jurisdiction of an English Court (see *Taylor* v. *Best*, 23 L. J. C. P. 89, 93, expressions of Maule J., and *Mighell* v. *Sultan of Johore*, '94, 1 Q. B. (C. A.) 149, 159, 9 R. July, 199, 202, judgment of Esher M. R., where Lord Esher's expressions certainly refer to submission by appearance in an action). And if a sovereign can thus submit to the jurisdiction of the Court, the natural inference is that his representative can do so also; and this view is certainly confirmed by *Taylor* v. *Best*, 14 C. B. 487, 522, 523, judgment of Jarvis C. J. Yet the conclusion that an ambassador can thus

waive his privilege is open to grave doubt. 7 Anne, c. 12, s. 3, as interpreted by the *Magdalena Steam Navigation Co. Case*, 2 E. & E. 94, makes the service of a writ on any ambassador or public minister 'utterly null and void.' The result would seem to follow that no action can be entertained against him; and this is certainly the conclusion which is suggested, if not positively laid down, by *Musurus Bey* v. *Gadban*, '94, 2 Q. B. (C. A.) 352, 9 R. Aug. 243. Nor is there really any inconsistency in the doctrine that in some respects the privileges of an ambassador may, at any rate under 7 Anne, c. 12, be wider than those of the sovereign whom he represents.

Secondly: Have our Courts jurisdiction to entertain a counter-claim against an ambassador who himself appears in them as plaintiff?

With the answer to this question the statute of Anne has, it is submitted, no concern. The reply to it must depend on general principles. It is certain, on the one hand, that any one who brings an action in a Court, submits, as regards that action, to the jurisdiction of the Court. It is clear, on the other hand, that even independently of the statute of Anne, an ambassador is not liable to have an action brought against him, and that a counter-claim is, or may be, nothing more than a cross action. The conclusion from these premises ought to be, it is submitted, that the jurisdiction of the Court to entertain a counter-claim against an ambassador depends on the nature of the counter-claim. If the counter-claim is in reality a defence to the action, if it in substance shows that the defendant is under no liability to the plaintiff, then it can be entertained, for the ambassador who appears in Court, certainly as regards the particular action, submits to the procedure of the Court. If, on the other hand, the counter-claim is in reality a cross action, then, it is submitted, the Court has no jurisdiction to entertain it. If this conclusion be correct, it may be stated in a concrete form as follows: *A*, an ambassador accredited to the Crown, sues *X* for a debt of £100. *X* pleads a set-off of £100 due from *A* to *X*, and the original debt and the set-off are really the results of one business transaction between *A* and *X*. This set-off, or counter-claim, can be entertained. *X* pleads, not a set-off but a counter-claim in the strictest sense of the term, that is to say he answers *A*'s demand by a counter-claim for damages in respect of some wrong done by *A* to *X*. Such a counter-claim cannot, it is submitted, be rightly entertained.

The 'living picture' cases, *Hanfstaengl* v. *Empire Palace* (no. 2), 7 R. Aug. 80, *Hanfstaengl* v. *Empire Palace* (no. 1), '94, 2 Ch. 1, 7 R. Sept. 84 (both in C. A.), make a good example of the true principles of copyright law. Copyright is not a property in ideas conferred by

the law of nature, as certain philosophers have vainly talked, but a monopoly specially created by law on grounds of public utility, and a monopoly not in ideas or artistic motives in the abstract, but in particular forms of expression. Therefore copyright in a work of literature or art can be infringed only by a reproduction *ejusdem generis*, a picture by something pictorial, and so forth. It does not follow, however, that infringement might not be indirectly committed by reconstruction of the original design from something which was not itself an infringement, even if the reconstructor had no direct acquaintance with the original; it was expressly allowed by the Court of Appeal that it could be so, though they held that in the particular case it was not. The questions of dramatizing literary work and of 'performing rights' are not touched by these decisions, and stand on a special footing.

Helby v. *Matthews*, '94, 2 Q.B. (C.A.) 262, is a case of some practical importance. It determines that the now common 'hire and purchase' agreement of goods—in the particular instance of a piano—is in reality from the beginning not a 'hiring' but a conditional sale of the goods. The consequence follows that the so-called hirer can under the Factors Act, 1889, at once pledge or sell a piano obtained on the hire and purchase system to any purchaser who takes it bona fide without notice of the right of the original seller, and the pledgee or buyer obtains a good title to the piano against the original owner. We do not know that there is any reason for quarrelling with the judgment of the Court of Appeal in *Helby* v. *Matthews*. Logically it is defensible. The hire and purchase system must involve either a hiring or a sale, and when carefully analyzed, it appears to be a conditional contract for the sale of goods. Nor is it reasonable to object that the original owner of the piano is hardly treated. Either *A* who sells, or *X* to whom the piano is ultimately sold by the hirer, must suffer from the hirer's fraud, and on grounds of justice and expediency it appears at least as fair that *A* should suffer as *X*. It is nevertheless probable that the principle established by *Helby* v. *Matthews*, if it ultimately be upheld, will make piano makers fight rather shy of the popular hire and purchase system. In *Shenstone* v. *Hilton*, 10 R. Sept. 311, Bruce J. followed this decision and extended it for the protection of an auctioneer, holding that not only delivery to a purchaser or the like under a contract to which he is a party, but delivery to an auctioneer for sale on the possessor's account, is a disposition or agreement for disposition of the goods within s. 9 of the Act.

Clements v. *L. & N. W. Ry. Co.*, '94, 2 Q. B. 482, C. A. is a decision of great interest (for so long as the Employers' Liability Act stands in its present form) to the company concerned, and all other employers who have established insurance funds on the 'contracting out' system. But perhaps there is more general and more permanent interest in the refusal of the Court of Appeal to limit by reference to particular classes of contracts the power of the Court to say that a contract made by an infant is binding on him as being on the whole for his benefit. The case also finally settles (if any more authority were needed) that a contract is for an infant's benefit if it appears advantageous to him when taken as a whole, and that the existence of qualifying or restrictive provisions which leave a balance of benefit does not deprive it of that character.

Lord Westbury once wished that there were no cases, and *In re Clark, Ex parte Beardmore* (9 R. July, 249), a contest between the trustee under a first bankruptcy and a trustee under a second bankruptcy, serves to illustrate his point of view. The Bankruptcy Act is clear. It says plainly enough (s. 44 (2) (i)) that after-acquired property is to vest in the trustee, i. e. the first trustee, but then to perplex the question comes *Cohen* v. *Mitchell* (25 Q. B. D. 262), laying down the considered proposition, that until the trustee intervenes all transactions by a bankrupt after his bankruptcy with any person dealing with him bona fide and for value in respect of his after-acquired property, whether with or without knowledge of the bankruptcy, are valid against the trustee. This doctrine of *Cohen* v. *Mitchell* is an equitable graft on the Act illustrating Aristotle's definition of equity as a rectification of the law where it fails from generality, but like other engrafted equitable doctrines, it must be in furtherance, not in derogation of the common or statute law which it amends. The substance of *In re Clark* is that a trustee in bankruptcy is not a purchaser for value, and therefore not within *Cohen* v. *Mitchell.* It was a plausible argument to say that the credit given by the creditors under the second bankruptcy has gone to manufacture the after-acquired property. The answer is, you ought not to give credit to an undischarged bankrupt. In speculations like these we are quitting the plain words of the *lex scripta* and disregarding general principles in the endeavour to do what Lord Bramwell called 'fanciful' justice in particular cases.

Chitty J. has held *in re Budgett*, '94, 2 Ch. 557, that the curious little exceptions to the rule of distributing joint and separate estates in bankruptcy were not (as many learned persons had

supposed) abrogated by the Act of 1883. If this result is contrary to the intention of the Act, it can easily be set right. But we have some difficulty in following one of the reasons given. Lord Herschell's well-known remarks in the *Vagliano* case on the interpretation of a codifying Act are held not to apply to the Bankruptcy Act, 1883, because it is not a codifying Act, but an Act to amend and consolidate the law. To codify, surely, is to consolidate, and to consolidate is almost always to amend, more or less. The common form in the preambles of the Anglo-Indian Codes is 'define and amend.'

When Lord Hermand, the Scotch Judge, was embarrassed with a statute, he used to say 'in his snorting and contemptuous way,' so Lord Cockburn tells us, 'But then we were told that there is a statute against all this. A statute! What is a statute? Words —mere words. No, my Lairds, I go by the law of right reason.' The Court in *Reg.* v. *Judge Snagge* (70 L. T. 874) must have adopted some such heroic method as this if it wanted to get rid of section 72 of the County Court Act, 1888. No doubt it is a matter of great moment to solicitors whether managing clerks are or are not entitled to audience in a County Court. The denial of such audience means that large firms must give up their County Court business practice altogether, for it will hardly be worth the principals' while to attend to such matters. Granting, however,—what it would be impossible to deny—that managing clerks are fully competent—a highly intelligent and capable set of men—the words of the Act are plain, and the policy of the Act is plain. That policy is, as Lord Cairns expressed it in *Ex parte Broadhouse* (L. R. 2 Ch. 655), not only that the Court should have before it a person who is under an obligation to it as one of its officers, but a person who is also under an obligation to the suitor because he is in privity with him, and actually represents him. *Reg.* v. *Snagge* may not be an unqualified misfortune, if it distributes County Court business among those solicitors who can give a personal attention to it.

'I always consider it a defect in a speech,' said Douglas Jerrold, 'when you can't understand what it means.' It is just as desirable that conveyancers' phrases should be intelligible and precise. 'As if she had died without having been married,' for instance, the ordinary words in an ultimate trust of the wife's property in a marriage settlement, what do they mean? Do they exclude children or not? Knight Bruce and Turner L.JJ. (*Wilson* v. *Atkinson*, 4 D. J. & S. 455) and Stirling J. (*In re Arden's Trusts*, W. N. 1890, 204)

thought they did not. Jessel M.R. (*Emmins* v. *Bradford*, 13 Ch. D. 493) thought they did. At the first blush of the thing it is difficult to see how a wife, who dies 'without having been married,' can have children in contemplation of law. But this is just a case for not 'sticking in the bark'; but for looking at the general intent and scheme of a marriage settlement, and so looking at it, the obvious intent, though clumsily expressed, is to exclude the husband only, even though there is not the usual trust for children earlier in the settlement. After Chitty J.'s decision in *Stoddart* v. *Savile* (8 R. August, 150), we may fairly hope the form is finally settled. Another question which would also have been 'nuts' to the Schoolmen was that raised in *In re Shaw, Robinson* v. *Shaw* (8 R. August, 208), whether an illegitimate child *en ventre sa mère* can acquire the reputation of legitimacy. A child *en ventre sa mère* can do many wonderful things, we know, but not this.

The old doctrine of unity between husband and wife is in a dilapidated, not to say ruinous condition, but it still affords good cover for a married woman who wishes to exercise her immemorial privilege of changing her mind. A male infant who executes a marriage settlement and covenants to bring in after-acquired property, must make up his mind to affirm or disaffirm within a reasonable time. So must a lady infant; but an infant wife is a more complex and more elusive persona. The daring proposition advanced on behalf of the ex-infant wife in *In re Holford* (7 R. August, 64), was that a married woman is incapable either with or without the concurrence of her husband of affirming her covenant made while an infant. This attempt to stultify herself did not commend itself to the Court. A married woman may have capacity to elect, though she has none to contract. She is quick enough to exercise a mature discretion when she sees her way to the benefits of independence; when, for instance, it is a case of taking possession of settled property as equitable tenant for life and managing it for herself, *In re Newen* (8 R. July, 129).

Ponting v. *Noakes*, '94, 2 Q.B. 281, 10 R. July, 283, is one more in the series of cases which show that the rule in *Fletcher* v. *Rylands*, L. R. 3 H. L. 330, is too severe a rule to be extended beyond the terms in which it was laid down. A man is answerable for any noxious or dangerous thing which he may have on his land, to the extent of keeping it within his own bounds 'that it may not trespass,' as one old book says. He is not bound to keep it out of reach of his neighbour or his neighbour's beasts if

they come to it by their own trespass. In this case the noxious thing was a yew-tree growing on the defendant's land near the plaintiff's field, but not encroaching on it. The plaintiff's horse put his head across the boundary, ate of the yew-leaves, and died. He could get at the poison only by trespass, though a small trespass. If the defendant had been bound by contract or special custom to fence against his neighbour's cattle, he would have been liable for the natural consequence of omitting the special duty. No such duty being imposed on him, he was under no duty at all in the matter.

A by-law of a borough imposes a penalty on any person making a noise in the streets to the 'annoyance of the inhabitants.' A newspaper boy shouts out the name of a newspaper incessantly for six minutes to the annoyance of *A.* The magistrates hold that since only one inhabitant of the borough was annoyed, the boy could not be convicted of an offence against the by-law. The Queen's Bench Division has set them right and has laid down that if the act complained of is of such a character as to be likely to annoy the inhabitants generally, it is not the less an offence under the by-law because only one of the inhabitants is in fact annoyed. *Innes* v. *Newman*, '94, 2 Q.B. 292, 10 R. Sept. 269. This is good sense and good law, and most satisfactory to all who hold that the inhabitants of towns have a right to be protected from the nuisance of gratuitous noise.

The alleged alarming increase of lunacy seems reflected in the number of reported cases in which lunatics figure. *In re Martha Baggs* (63 L. J. Ch. 613) may be usefully contrasted with *In re X.* ('94, 2 Ch. (C. A.) 415) as to powers of sale by lunatic tenants for life under the Settled Land Act and otherwise; but the case which will appeal most to the imaginations of business men in general is that of a lunatic partner at large, signing cheques at random in the firm's name. If this were a wrong without a remedy it would be a grievance of the first magnitude, but Stirling J. found the principles of equity elastic enough to meet the case. It is rather beside the mark to say that an injunction ought not to be granted against a lunatic because he cannot be contumacious. What the Court is concerned with is his acts not his mind, and if his mind runs away with him as the late Lord Stuart's legs did with him, the kindest thing is to protect him against himself. 'Lunacy,' as Lord Bramwell said, 'is not a privilege, but a misfortune.' In illustration of the last remark, *In re Winkle* (7 R. July, 91) may be

cited: the Court will not allow an execution creditor to strip a lunatic of all his property and turn him into a pauper lunatic asylum, but it will not go further and provide for the maintenance of the lunatic's wife as well as his own out of the lunatic's property at the expense of creditors.

In re Bird, Bird v. *Cross* (8 R. July, 150) it was a question of the effect of lunacy on a condition—a condition subsequent that the legatee should return to England within three years. Lunacy had at the date of the testator's death overtaken the legatee, and had it been lunacy pure and simple, the Court would have had no difficulty in treating the condition as one impossible of fulfilment by the act of God, but the lunatic complicated matters by having lucid intervals from time to time during which he might have performed the condition. But really lunacy is a state so disturbing to the ordinary tenour of existence, that a lucid interval or two is not enough to restore equanimity. *In re Stratheden* (8 R. July, 175) was a more unfortunate case of condition. It is satisfactory to know that our law takes the generous view that a bequest to a volunteer corps is a gift to a charity, but in the particular instance this generous appreciation of the volunteer movement reads rather too like one of Joseph Surface's 'Noble sentiments.' The appointment of another Lieutenant-Colonel—the condition in question—might, of course, never take place within the limits of time prescribed by the rules against perpetuities. As a matter of probability we may think it would, but the law cannot listen to probabilities.

A correspondent at New Westminster, British Columbia, writes as follows:—'The report of the Highwayman's case (*Everet* v. *Williams*) in the issue of the LAW QUARTERLY REVIEW of July, 1893, was both interesting and amusing. It seemed almost beyond belief that such a case could ever have been instituted in an English Court of Justice. I was also surprised to find an almost parallel case brought in this age in the Courts of the State of Washington, our neighbour on the south. The enclosed clipping which speaks for itself, and may not be without interest to you, is taken from the *Daily Post Intelligencer*, a newspaper published in the City of Seattle, the largest city (population 60,000) in the State. The action was brought in the Superior Court, a Court of general jurisdiction and the highest Court in the State for the trial of actions, the Supreme Court being merely a Court of Appeal. I might also remark, though perhaps it is needless, that running a gambling house is a criminal offence under the laws of

the State.' The extract has the businesslike head-line, 'Partners in Gambling can swindle each other at will,' and the first paragraph opens as follows:—'Judge Humes yesterday ruled that courts were not intended to protect partners in gambling from cheating each other'—and the suit before him was therefore dismissed. The suit was in effect for an account of the profits of a gambling house, and the plaintiff alleged embezzlement. The body of the report is in a sporting Western dialect, and mixes up the internal and the external frauds of the game (the latter were of course irrelevant as between the partners). We think it would be obscure to the majority of British readers, and are unable in vacation time to find a qualified commentator.

The evidence taken by the Gresham University Commission was published soon after the issue of our last number. Many witnesses, not only teachers of law but judges and leaders of the profession, were examined on the relation of legal studies to university education. In the result there was practical unanimity of opinion that the Inns of Court and the Incorporated Law Society might and ought to be intimately associated with the Faculty of Law in the new teaching University of London, and that there would be no difficulty in providing for this without prejudice to the existing rights of controlling the admission of students as practising barristers and solicitors. Immediate action on the report can hardly be expected in the present state of public affairs, but it is only a question of time. Will the Benchers, or the Council of the Incorporated Law Society, be wise enough to come forward while they have time to do it with a good grace? Whichever body does so first will considerably improve its position before the public.

We owe Judge Dillon and his printers an apology. In our July number (p. 278) we treated 'base *Judean*,' as quoted from the last scene of Othello, as a misprint. We still believe that *Indian* is the true reading and that *Judean* was a misprint: but it is no new one, for it is the reading of the first folio and has been supported by a respectable minority of modern Shakespeare critics. The allusion is obscure in any case.

It seems convenient to repeat in a conspicuous place that it is not desirable to send MS. on approval without previous communication with the Editor except in very special circumstances; and that the Editor, except as aforesaid, cannot be in any way answerable for MSS. so sent.

CHOSES IN ACTION.

THE question raised by Sir Howard Elphinstone in a recent number of this REVIEW[1], is not an easy one to answer, for the learning on the subject has grown up in the irregular way characteristic of English law, and until within the last few years it has been treated by our text-writers rather as an incident to some other branch of law than as a subject by itself.

If 'chose in action' properly means nothing more than money or property which a person is entitled to recover by bringing an action, the extension of the term to such kinds of property as shares, stocks, patents, copyrights, &c., and to debts payable *in futuro*, is undoubtedly inaccurate. A share in a company is an interest in a certain property or undertaking; it gives a right to participate in the management, profits, and assets of the company[2], but it need not, and in the majority of cases never does, give rise to any right of action against the company to recover what the share represents. If I hold a £100 share, fully paid up, in a company, I have, as a rule, no right to take proceedings against the company to recover the £100. The company may never declare a dividend[3], and although I may object to this course, I have no remedy by action. It is true that if the company does declare a dividend, I have a right of action to obtain payment of my proportion, but that is a separate chose in action[4], which may be converted into a chose in possession by payment of the money; my rights in respect of the share itself continue as before. Still less is stock in the public funds a chose in action in the narrow sense of the term: no action lies to recover the interest if default is made by the government, while the principal is a purely fictitious amount; it is merely a cipher by which the interest is computed[5]. Again, a patent, copyright or trademark is a kind of property which, as Sir H. Elphinstone has pointed out, is essentially negative; it may never give rise to a right of action. As regards debts payable at a future time, although it has long been settled that a certain debt

[1] 'What is a Chose in Action?' LAW QUARTERLY REVIEW, vol. ix. p. 311.

[2] See the argument in *Tempest* v. *Kilner* (1845), 2 C. B. at p. 307.

[3] This was one of the reasons given by Shadwell V.-C. to account for the old rule that trustees were bound to convert Bank stock: *Mills* v. *Mills* (1835), 7 Sim. 501.

[4] *Dalton* v. *Midland Counties Ry.* (1853), 13 C. B. 474.

[5] Stock in the public funds is not within a statute making persons having 'money out at interest' liable to be rated in respect of it for the relief of the poor: *Rex* v. *St. John Maddermarket* (1805), 6 East 182.

payable at a certain future time is a chose in action[1], it was not absolutely settled until 1878 that money payable in an uncertain event under a contract is a chose in action so as to be assignable at law under s. 25 of the Judicature Act, 1873[2].

Originally, no doubt, 'chose in action' meant a right of action and nothing more. So far as my limited researches go, the earliest case in which the phrase occurs is an action for maintenance in the Year Book 9 Hen. VI, 64, where one of the judges treated a claim to title-deeds as a chose in action[3]. It also occurs in 37 Hen. VI, 13, where the question arose whether an assignment of debts was a good consideration for a bond, the argument *contra* being that 'c̃ debtz ne fuĩ forsque chose en actiõ.' I have not come across any other instance of the use of the term 'chose in action' itself in the Year Books, but there are several equivalent phrases which throw light on the original meaning of the term. Thus in 13 Ed. III[4], in an action of account brought by three executors against one of themselves, to the argument that an executor could be made to account before the ordinary, it was replied: 'Jammes de chose qe feut en accion en la vie le testatour, fors qe de chose qest en lour pocessioun come executours, qar ceo qe feut en accioun en la vie le testatour ne touche testament ne matrimoigne.' So in 21 Ed. IV, 84, on a *scire facias* for an annuity, it is said: 'Cest annuity est personal, q̃ gist touts dits[5] en acc̃ qĩ acc̃ ne puit estr̃ grãt, come d'un obl', l'acc̃ de c̃ ne puit estr̃ grãt ouster, ne l'acc̃ sur le simple contract, nient plus cest añuity.' These passages show clearly, I think, that 'chose in action' originally meant merely a right to recover money or property by action. But the meaning of the term was soon extended so as to include rights analogous to rights of action, such as rights of entry, and finally to a number of miscellaneous rights which, being in the nature of what is now called incorporeal property, were naturally enough opposed to 'choses in possession,' and consequently included in 'choses in action.'

There is a title 'Chose en action & Chose en suspence' in Brooke's Abridgement, and the term 'chose en action' occurs in several of the placita, but these are for the most part free paraphrases of the original authorities. They are, however, of interest, in so far as they show what was considered a chose in action in Brooke's time. Most of the cases are grants of choses in action by or to the crown; these include an annuity, bond debts, goods forfeited, tithes, and

[1] Co. Litt. 292 b.

[2] *Brice* v. *Bannister*, 3 Q. B. D. 569; *Walker* v. *Bradford Bank*, 12 Q. B. D. 511.

[3] This and many other cases in the Year Books relating to the assignment of choses in action are cited in Pollock on Contract, App. F.

[4] Pike's edition; Record Pub. 1885.

[5] *Sic* in orig. Probably a misprint for 'touts foits.'

marriage of a ward. In this last case (pl. 11), where the crown granted a wardship, it is said: 'Le graunt puis est bon, car le roy poet grant chose in accion que est certeyn, ut hic et dett, mes nemy trespas, car ceo est incertayne.' Pl. 13 is the case of title deeds already mentioned (9 Hen. VI, 64): in this placitum occurs the expression: 'les charters sont choses in acciõ.' Under the same title Brooke also gives a note of a case in 33 Hen. VIII, arising on the statute 31 Hen. VIII for the suppression of monasteries. This Act vested in the king without office all rights, entries, actions, conditions, &c., belonging to the monasteries, and declared that he should be deemed in actual and real possession thereof. Some of the judges said: 'Uncore si abbe fuit disseisi de 4 acres de terre, le roy ne poet ceo graunt ouster devant entree fait per luy in ceo, pur ceo q̃ est chose in accion reall, et nyent semble al chose in accion personal ou mixt, come dett, garde & hujusmodi.' Others were of opinion that as to lands 'dont labbe navoit q̃ cause dentre ou droit in accion, de ceux le roy serra vest d'un titl' dentre and title daccion, mes le chose a q̃ il ad tiel cause dentre ou daccion nest pur ceo in luy in possession, et ideo ne poet passer del roy per generall parolx.' I quote this case in order to show that the distinction between choses in action real and choses in action personal existed as early as Henry VIII's reign.

There is no title 'Chose in action' in Fitzherbert's or Rolle's Abridgements, but there is a sub-title (G) *Choses en Action* under title 'Graunts' in Rolle's Abridgement, and the rule that 'chose en action nest grantable oustre,' is stated in the same title (sub-title F). It may be observed in passing that many of the sub-titles deal with questions of real property under the heading 'Chose': such as *Choses en Reputation, Choses de Trust, Quel Chose poet estre grant*, &c., &c.[1] It would hardly be necessary to point out that 'chose' is not equivalent to 'chattel personal,' were it not that Blackstone continually makes that mistake[2]. As a matter of fact the most important kind of choses in action in former days were choses in action real[3], as we shall presently observe.

In 11 Elizabeth the question was raised whether the grant of the next presentation to a church during an avoidance was good, and it was held by a majority of the court 'that the grant of the present avoidance is void, because it is a mere personal thing annexed to the person of him who was patron in expectancy at the time of the

[1] See especially sub-title (O) dealing with a 'chattell que est derive hors de un real chose et carry un interest de un reall chose,' as opposed to 'un personall chose come un chivall, que ne poet estre grant durant le vie grantee.'

[2] Not merely in omitting choses in action real from his definition of 'chose in action,' but in expressly treating 'chose' as equivalent to 'chattel personal' (Comm. ii. 434 seq.).

[3] See 10 Rep. 48 a.

vacancy; and also a thing in right, power and authority, and also a *chose in action*, and in effect the fruit and execution of the advowson, and not any advowson: and yet executors shall have it by privity of law[1].' This judgment is instructive in showing the way in which the term 'chose in action' gradually came to be applied to almost any right which cannot be granted over. The real reason why choses in action arising from contract were not assignable was, as Sir F. Pollock has pointed out[2], that they were rights of a personal nature. In the case of choses in action real, arising from disseisin, &c., this reason did not apply, because obviously no personal relation exists between disseisor and disseisee; the true reason why such choses in action were not assignable was that in the days when there was practically no Statute of Limitations, and the danger of maintenance was a real danger, 'terre-tenants' in peaceable possession ought not to be disturbed by persons who had bought up rights of entry and rights of action. A right of presentation to a church during a vacancy is not assignable, because the sale of such a right, which is an interest not of profit but of trust, would be contrary to public policy[3].

In *The Marquis of Winchester's* case[4] it was held that a mere right of action real was not affected by an Act forfeiting to the king all the lands, rights, conditions, and other hereditaments of a person who had been attainted of treason, 'for it would be very vexatious and inconvenient that estates of purchasers and others, after many descents and long possession, should be impeached at the king's suit, by such general words, against the reason and rule of the common law[5].'

In *Lampet's* case[6] 'was observed the great wisdom and policy of the sages and founders of our law, who have provided that no possibility, right, title nor thing in action, shall be granted or assigned to strangers, for that would be the occasion of multiplying of contentions and suits, of great oppression of the people, and

[1] *Stephens* v. *Wall* (1569), Dyer 283, pl. 29. Followed in *Brokesby's* case (1589), 1 Leo. 167; Cro. Eliz. 174.

[2] Pollock on Contract (5th edit. 206). Coke evidently felt that this was the true reason, for he says that a lord cannot take advantage of any obligation or covenant or other thing in action made to his villein, 'because they lye in privity and cannot be transferred to others' (Co. Litt. 117 a). He gives a somewhat similar reason in the case of a next presentation during the vacancy of an advowson (Co. Litt. 388 a). See also Mr. J. B. Ames's remarks, Harvard Law Review, iii. 339.

[3] See Mr. Hargrave's note to Co. Litt. 90, and the dictum of Lord Mansfield and Mr. Justice Wilmot in *Bishop of Lincoln* v. *Wolferstan* (Burr. 1512) 'that the true reason why a grant of a fallen presentation, or of an advowson after avoidance, is not good *quoad* the fallen vacancy, is the public utility and the better to guard against simony: not for the fictitious reason of its being then become a *chose in action*.'

[4] (1583) 3 Rep. 1.

[5] Compare *Ford and Sheldon's* case, 12 Rep. 1; *Case of Forfeiture by Treason*, 12 Rep. 6.

[6] (1603) 10 Rep. 48 a.

chiefly of terre-tenants, and the subversion of the due and equal execution of justice. . . . But all rights, titles and actions may by the wisdom and policy of the law be released to the terre-tenant, for the same reason of his repose and quiet, and for avoiding of contentions and suits, and that every one may live in his vocation in peace and plenty.'

Sheppard's Touchstone, which is supposed to have been written by a contemporary of Lord Coke, speaks of 'things in action, as a right or title of action that doth only depend in action, and things of that nature, as rights and titles of entry to any real or personal thing[1].' 'Things in action, and things of that nature, as causes of suit, rights and titles of entry, are not grantable over to strangers but in special cases[2].' 'A presentation to a church, after the church is become void, is not grantable, for it is in the nature of a thing in action[3].'

In Lord Coke's time, therefore, 'chose in action' had come to mean a good deal more than a mere right of action, and was almost equivalent to a right incapable of being assigned or granted over. Accordingly, when Coke is expounding the law relating to the right of presentation to an advowson during a vacancy, he gives as the reason why such a right may be exercised in certain cases by persons other than the owner, that 'albeit it be not grantable over, yet it is not meerly a chose in action . . . but otherwise it is of a bond, because that is meerly in action[4].' Again, a release of all actions releases a certain debt payable at a certain future time, 'for that the debt is a thing consisting meerely in action . . . albeit no action lyeth for the debt[5].' But such a release does not release rent or an annuity accruing due after the release, for the reason that the rent or annuity 'is not meerely in action, because it may be granted over[6].'

In the case of chattels real, Coke draws a distinction between those 'consisting meerely in action' (such as a writ of right of ward, a *valore maritagii*, a forfeiture of marriage, and the like) and 'chattels reals being of a mixt nature, viz. partly in possession and partly in action. . . . As if the husband be seised of a rent service, charge or seck, in the right of his wife, the rent become due during the coverture, the wife dieth, the husband shall have the arerages; but if the wife survive the husband she shall have them, and not the husband. So it is of an advowson, if the church become voyd during the coverture, he may have a quare impedit in his owne name, as

[1] P. 231. [2] P. 240. [3] P. 241. [4] Co. Litt. 120 a. [5] Co. Litt. 292 a.
[6] Co. Litt. 292 b. See further as to an annuity being a chose in action, *Gerrard* v. *Boden* (1628), Hetley 80; *Priddy* v. *Rose* (1817), 3 Mer. 86; *Wiltshire* v. *Rabbits* (1844), 14 Sim. 76.

some hold; but the wife shall have it if she survive him; and the husband if he survive her; *et sic de similibus.* But if the arerages had become due, or the church had fallen voyd before the marriage, there they were meerely in action before the marriage; and therefore the husband should not have them by the common law, although he survived her[1].'

The expression, 'chose in action real,' does not seem to occur in Coke's Commentary on Littleton, but in his note on section 347, where Littleton says that no entry or re-entry can be reserved or given to a stranger, Coke remarks: 'Here Littleton reciteth one of the maxims of the common law; and the reason hereof is, for avoyding of maintenance, suppression of right and stirring up of suits; and therefore nothing in action, entrie or re-entrie, can be granted over; for so under colour thereof pretended titles might be granted to great men, whereby right might be trodden down, and the weak oppressed, which the common law forbiddeth, as men to grant before they be in possession[2].'

I have been unable to trace the process by which the term 'chose in action' came to mean exclusively a chose in action personal. It was evidently in a state of transition in the eighteenth century, because while Jacob's description of a chose in action includes choses in action real[3], Blackstone's definition, quoted by Sir Howard Elphinstone, is clearly confined to choses in action personal, for it forms part of a chapter entitled, 'Of Property in Things Personal[4].' Probably the restriction of the doctrine of descent cast[5], the limitation of actions to land[6], and the gradual disuse of real actions even before their formal abolition, are sufficient to account for the change. The point is of historical interest, because I think it explains the apparent inconsistency of the common law in absolutely forbidding the assignment of choses in action real on the ground of maintenance, and yet permitting debts to be effectually assigned by the device of allowing the assignee to sue in the name of the assignor. The inconsistency disappears if we consider that the fulminations against maintenance and champerty, which abound in the old books, were directed not so much against the maintenance of actions of debt and the like, as against abuses arising from the practice of buying up rights of entry and rights of action for the recovery of land, and (in a smaller degree) against the oppression and blackmailing of suitors by officers of

[1] Co. Litt. 351. [2] Co. Litt. 214 a.

[3] 'A person disseises me of land, or takes away my goods; my right or title of entry into the lands, or action and suit for it, and so for the goods, is a chose in action.' Jacob, Law Dict. 4th edit. (1739). The first edition was published in 1729.

[4] The first edition of the Commentaries was published in 1765–9.

[5] Stat. 32 Hen. VIII, c. 33. [6] Stat. 32 Hen. VIII, c. 2.

courts and other persons of influence. I cannot account in any other way for the language used in Britton[1], Coke[2] and the statutes against maintenance, from 3 Ed. I, cc. 25 seq. down to the Act of 1540 'Agenst maintenance and embracery byeng of titles &c.[3]' Sect. 1 of this Act runs as follows: 'The king our Sovereign Lord, calling to his most blessed remembrance, that there is nothing within this realm that conserveth his loving subjects in more quietness, rest, peace and good concord, than the due and just ministration of his laws, and the true and indifferent trial of such titles and issues, as been to be tried according to the laws of this realm, which his most Royal Majesty perceiveth to be greatly hinddred and letted by maintenance, embracery, champerty, subornation of witnesses, sinister labour, buying of titles and pretenced rights of persons not being in possession, whereupon great perjury hath ensued, and much inquietness, oppression, vexation, troubles, wrongs and disinheritance hath followed among his most loving subjects, to the great displeasure of Almighty God, the discontentation of his Majesty, and to the great hindrance and let of justice within this his realm: For the avoiding of all which misdemeanors and buying of titles and pretenced rights, . . . be it enacted . . . that from henceforth all statutes heretofore made concerning maintenance champerty and embracery or any of them, now standing and being in their full strength and force, shall be put in due execution, according to the tenures and effects of the same statutes.' This is not the language of a judge or author bent on discovering some far-fetched reason to account for a technical rule of law: it is the emphatic language of a legislator who sees that maintenance and similar abuses still continue, notwithstanding numerous statutes directed against them, and accordingly makes another effort to suppress them.

The statute 32 Hen. VIII was primarily, if not entirely, directed against maintenance in relation to suits concerning land, and against the buying of 'pretenced titles.' Any one buying a right or title to lands, forfeited the value of the lands, and the seller forfeited the lands themselves, unless the seller had been in possession for a whole year before the sale, or unless the buyer was at the time of the sale in lawful possession.

Maintenance and the buying of titles by persons out of possession were illegal at common law, and this statute did little beyond adding forfeiture as a penalty[4]. One kind of maintenance was

[1] Fo. 35, 37 b.
[2] See the quotations from his reports and commentary, supra pp. 306–308.
[3] Stat. 32 Hen. VIII, c. 9. This is the title as given in the first edition of the Statutes Revised. The quotation is taken from the Statutes at large.
[4] As to the construction of the statute, see *Partridge* v. *Strange* (1552), Plowd. 77.

distinguished by the old writers as 'maintenance in the countrey,' *manutentio ruralis*, being confined to claims in respect of land[1], and the very name of champerty shows that the offence had a similar origin[2]. One reason why feoffments to uses were resorted to before the Statute of Uses was that the feoffee, if a person of wealth or influence, could assist or protect his *cestui que* use in litigation connected with the land[3].

With regard to choses in action personal, the position was materially different. It is clear from the case in 33 Hen. VIII, cited by Brooke[4], that the rules as to the assignment of choses in action real, such as rights of entry and action in respect of land, were more strict than in the case of debts and other choses in action personal. Viner goes so far as to say that though a chose in action may be assigned over for lawful cause, as a just debt, but not for maintenance, yet 'a chose in action real as entry, he [*sic*] cannot grant over: and it is not like to a chose in action personal or mixed, as debt, ward, &c.[5]' The difference between the two classes of choses in action is further shown by the fact that while the rule that a debt may be assigned by way of satisfaction or for other lawful cause, so as to enable the assignee to sue in the assignor's name, is as old as Henry VII[6], yet the question whether a possibility could be assigned, even in equity, was not, apparently, settled until 1729[7]. Again, it must be remembered that the most important choses in action personal, namely, bills of exchange, were assignable at law by the custom of merchants from an early date.

It is curious that the argument against the assignability of choses in action, possibilities, &c. on the ground of maintenance, which appeared so strong to Lord Coke[8] and the judges of his time, appeared insufficient, if not absurd, to the judges of the eighteenth century. Thus in *Thomas* v. *Freeman*[9], where the assignee of a possibility brought a suit in equity to enforce his claim, the Lord Keeper said: '*Equitas sequitur legem*, and that which is the rule of law, must be the rule here. It is a notion that has obtained

[1] Co. Litt. 368 b.

[2] See the Statute of Conspirators, 33 Ed. I.

[3] See the preamble to the Stat. 1 Rich. II, c. 9, which rehearses these abuses at some length and makes all feoffments for maintenance void: Doctor and Stud. 203; Litt. § 701.

[4] Supra, p. 305.

[5] Viner, Abr. *Assignment* D. pl. 5, 6. The authority cited from Brooke, which is the case in 33 Hen. VIII, above referred to, does not really support the second proposition in the form in which Viner states it.

[6] See the passages from Fitzherbert and Brooke set out in App. F. to Pollock on Contract. *South* v. *Marsh* (1859), 2 Leon. 234.

[7] *Thomas* v. *Freeman* (1706), 2 Vern. 563; notes to *Wind* v. *Jekyl*, 1 P. Wms. 574; *Robinson* v. *Bavasor* (1734), Viner Abr. *Assignment* D. pl. 29.

[8] See his remarks on the 'notable statute [39 Hen. VIII, c. 9] made in suppression of the causes of unlawful maintenance (which is the most dangerous enemie that justice hath)'; Co. Litt. 369 a.

[9] (1706) 2 Vern. 563.

at law, that a possibility is not assignable: but no reason for it, if *res integra*: but the law is not so unreasonable, but to allow that it may be released.' And he dismissed the plaintiff's bill. In the oft-quoted case of *Master* v. *Miller* [1], Buller J. said that the good sense of the rule seemed to him very questionable, and the strictness of the common law rule against maintenance he declared to be 'repugnant to every honest feeling of the human heart [2].'

This divergence of opinion appears to have arisen from a misunderstanding. When Coke and the judges of his day gave the evils arising from maintenance as the reason for not allowing the assignment of choses in action, they were thinking of rights of entry and action in respect of land, and other choses in action real. 'Maintenance in the country' had been a crying evil for upwards of two hundred years before Coke's time, but it seems to have almost completely disappeared in the seventeenth century. It may be doubted whether the 'notable statute' of Henry VIII against pretenced titles had much to do with this result. It is more probable that it may be attributed to the passing of the first Statutes of Limitations [3], the decay of feudalism, and the diminution of the power of the great landowners. However that may be, maintenance disappeared so completely that in the eighteenth century, as we have seen, the judges treated it as a bugbear, and now a right of entry may be devised by will or assigned by deed [4]. This alteration in the law has indirectly made obsolete much of the learning relating to 'pretenced titles [5].'

The extension of the term 'chose in action' to stock in the public funds, exchequer bills, shares in companies, &c., is necessarily obscure [6]. There does not appear to have been any funded national

[1] (1791) 4 T. R. at p. 340, 1 Sm. L. C. 9th ed. 853–4. It is curious that Buller, in commenting on the exception of the Crown from the rule, attributed it to the timidity of the courts. This is hardly fair, for the courts decided against Henry VIII when he claimed choses in action real under the general words of an act of forfeiture. Is it not more likely that the exception was a natural result of the maxim, that the king can do no wrong?

[2] Lord Redesdale in *Underwood* v. *Lord Courtown* (1804), 2 Sch. & L. at p. 65, and Maule J. in *Doe & Williams* v. *Evans* (1845), 1 C. B. at p. 726, take a less emotional, but more accurate, view of the rule.

[3] Stat. 32 Hen. VIII, c. 2; stat. 21 Jac. I, c. 16.

[4] According to *Hunt* v. *Bishop* (8 Each. 675), and *Hunt* v. *Remnant* (9 Each. 635), stat. 8 & 9 Vict. c. 106, s 6, does not authorize the alienation of a right of entry for condition broken. It is difficult to understand the reasons given for this decision, even with the assistance of the suggestion of Jessel M. R. in *Jenkins* v. *Jones* (9 Q. B. D. at p. 131). The section was obviously framed to carry out the recommendation of the Real Property Commissioners (Third Report, 1832, p. 69), which includes rights of entry for condition broken, as does the corresponding provision in the Wills Act.

[5] *Jenkins* v. *Jones* (1882), 9 Q. B. D. 128; *Kennedy* v. *Lyell* (1885), 15 Q. B. D. 491.

[6] It would be interesting to trace the gradual development of the law relating to shares and stocks, and the difficulty which the judges at first felt in fitting them into the fabric of the common law; this subject, however, is only indirectly connected with choses in action. References to it will be found in the cases cited

debt until after the Revolution. In the sixteenth and seventeenth centuries one of the devices resorted to by the crown for raising money was that of granting annuities, either perpetual or for a term of years, and charged on particular parts of the public revenue, but whether granted in fee or for years no question arose as to their assignability [1]. The public funds created during William III's reign were authorized by statute and were expressly made assignable [2]. Transfers of stock in the funds were always recognized by the courts of common law [3]. Nor was there any serious contest as to the assignability of exchequer bills [4].

The first English joint stock trading companies were created by charter or letters patent [5], and in each case, no doubt, the instrument of incorporation contained provisions as to the assignment of stock in the company. At all events no question as to the assignability of this kind of stock seems to have arisen [6]. In the seventeenth and eighteenth centuries the Bank of England and other trading companies were incorporated by letters patent issued under special Acts of Parliament: the stock in these companies was expressly made assignable [7]. But the question whether a company with transferable shares could be formed at common law simply by agreement between the members was long considered doubtful, and the formation of such companies was at first discouraged by the legislature [8]. After the repeal of the Bubble Act in 1825, transfers of shares in unincorporated joint stock companies were recognized by the courts [9].

It seems that the term 'chose in action' was applied to stock both in the public funds and in trading companies in the beginning of the eighteenth century, if not earlier, for a statute passed in 1729 [10] to abolish the common law rule that there cannot be larceny

in the following notes; see also *Ex parte Lancaster Canal Co.* (1832), Mont. & Bl. 94, and the cases there cited. The confusion continued as late as 1859: *Morris* v. *Glynn*, 27 Bea. 218.

[1] *York* v. *Twine* (1605), Cro. Jac. 78; *Earl of Stafford* v. *Buckley* (1750), 2 Vez. 171; *Radburn* v. *Jervis* (1840), 3 Bea. 450.

[2] Stat. 4 Will. & M. c. 3; 9 & 10 Will. III, c. 44, and other Acts of this reign.

[3] *Davis* v. *Bank of England* (1824), 2 Bing. 393; 5 B. & C. 185; see also *Bank of England* v. *Moffat* (1791), 3 Bro. C. C. 260; *Bank of England* v. *Lunn* (1809), 15 Ves. 569.

[4] *Wookey* v. *Pole* (1820), 4 B. & Al. 1.

[5] Homersham Cox, Inst. Eng. Gov. 610. Fenn on the Funds, 2. See the curious Act, 13 & 14 Car. II, c. 24, relieving holders of stock in the East India Co., the Guinea Co. and the 'Royal Fishing Trade,' from liability to being made bankrupt as traders.

[6] As to the stock of the old East India Co., see *Munn* v. *East India Co.* (1677), Cases temp. Finch 298; *Hall* v. *Cupper* (1693), Skin. 391. As to South Sea stock, see *Cud* v. *Rutter* (1719), 1 P. Wms. 570; *Emelie* v. *Emelie* (1724), 7 Bro. P. C. 259.

[7] Stat. 5 & 6 Will. & M. c. 20; 9 & 10 Will. III, c. 44. It seems that Bank stock was at one time treated as real estate; see stat. 8 & 9 Will c. 20, s. 33.

[8] Lindley on Companies, 3.

[9] *Walburn* v. *Ingilby* (1832), 1 M. & K. 61; *Re Mexican, &c. Co.* (1859), 4 De G. & J. 544.

[10] Stat. 2 Geo. II, c. 25.

of a chose in action[1], made it felony to steal 'any Exchequer orders or tallies, or other orders entitling any other person or persons to any annuity or share in the parliamentary fund, or any Exchequer bills, South Sea Bonds, Bank notes, East India bonds, dividend warrants of the Bank, South Sea Company, East India Company, or any other company, society or corporation . . . notwithstanding any of the said particulars are termed in law a chose in action.' But the earliest instance of a government security being termed specifically a chose in action which I have noticed in the reports is *Snelgrave* v. *Bayly*[2], where a government tally was so referred to. In *Row* v. *Dawson*[3] a fund payable out of the Exchequer for public services, and in *Dundas* v. *Dutens*[4] stock in the public funds, were treated as choses in action. A few years later the question arose as to the acts which, in the case of stock belonging to a married woman, would amount to reduction into possession by the husband[5], for 'this is a species of property grown up since all these distinctions were settled in our law[6].' It is obvious that if stock were a chose in action of the same nature as a debt or claim to goods, it could never be reduced into possession unless the government voluntarily redeemed it. However, it was finally determined that if the husband procured a transfer of the stock into his own name, this was a sufficient reduction into possession to bar the wife's right by survivorship, unless he acted as executor or trustee[7]. In 1817 the question arose whether stock passed under a grant of *bona et catalla felonum*, and the court, holding stock to be 'a chose in action, or in the nature of a chose in action,' decided that it did not[8]. In 1839 the question was raised whether a contract to sell shares in a joint stock banking company (apparently unincorporated) ought to be in writing under s. 17 of the Statute of Frauds, as being a contract for the sale of goods, wares, and merchandises, and it was held that 'shares in a joint stock company like this are mere choses in action, incapable of delivery, and not within the

[1] As to the origin of this rule, see Stephen, Hist. Crim. Law, iii. 144; Pollock and Wright on Possession, 233 seq.

[2] (1745) Cases t. Hardwicke, 202.

[3] (1749) 1 Vez. 331.

[4] (1790) 1 Ves. jun. 196, 1 R. R. 112. As to this case see *M'Carthy* v. *Goold* (1810), 1 B. & B. 389. Sir H. Elphinstone thinks that Lord Thurlow in *Dundas* v. *Dutens*, and Lord Blackburn in *Colonial Bank* v. *Whinney*, considered the question whether property could or could not be taken in execution at common law as the test of a chose in action, but this is not quite so. The question before Lord Thurlow was whether stock could be taken in equitable execution, and he held that being a chose in action it could not, by analogy to the common law rule. As to the reason for that rule, see Dyer 7 b. pl. 10; *Legge* v. *Evans*, 6 M. & W. 36.

[5] *Pringle* v. *Hodgson* (1798), 3 Ves. 617; *Mitford* v. *Mitford* (1803), 9 Ves. 87.

[6] Per Sir W. Grant in *Wildman* v. *Wildman* (1803), 9 Ves. 176, 7 R. R. 153.

[7] *Wall* v. *Tomlinson* (1810), 16 Ves. 413, 10 R. R. 212.

[8] *R.* v. *Capper*, 5 Price at p. 266.

scope of the 17th section[1].' In 1845 it was decided that a contract for the sale of railway shares might be the subject of an action at law; it was argued that being only choses in action, they were not the subject-matter of a legal sale, but Maule J. showed the fallacy of the argument: 'A chose in action cannot be transferred so as to enable the transferee to sue at law, but there is no illegality in the transfer. The law takes notice of these shares as things of value[2].'

But although stocks and shares are choses in action within the rules as to reduction into possession and reputed ownership, and for other purposes, they are in some respects treated as being (what they really are) property of a special kind. We speak of the 'legal estate' in shares as opposed to equitable rights and interests, just as if they were land or other tangible property[3]. Again, in questions of priority between various claimants, the law relating to the transfer of shares is quite different from that governing the assignment of ordinary choses in action, such as debts. If a share were a 'chose merely in action,' an assignment of it in writing, followed by notice to the company, would vest it in the assignee, and he would take subject to prior equities. But in the case of a company governed by the Companies Act, 1862, or the Companies Clauses Act, 1845, registration is an all-important element in the transfer of shares; in fact, registration is equivalent to seisin, for when a transfer to a bona fide transferee for value without notice has been registered, he acquires the 'legal estate' in the shares free from any equities affecting prior holders[4], but until he is registered, or has acquired an absolute and immediate right to be registered, his title is liable to be defeated by the prior equitable interest of some one else[5]. And according to the better opinion, in questions between equitable assignees of shares, priority is determined by order of date, not of notice to the company: in other words, the doctrine of *Dearle* v. *Hall* does not apply to shares in companies[6].

[1] Per Denman C.J. in *Humble* v. *Mitchell*, 11 Ad. & E. at p. 208.

[2] *Tempest* v. *Kilner*, 2 C. B. at p. 308.

[3] See the cases cited in the next three notes, and *Colonial Bank* v. *Hepworth* (1887), 36 Ch. D. 36, which was the case of shares in an American company.

[4] *Dodds* v. *Hills* (1865), 2 H. & M. 424; *France* v. *Clark*, 26 Ch. D. 257.

[5] *Roots* v. *Williamson* (1888), 38 Ch. D. 485; *Moore* v. *North Western Bank*, '91, 2 Ch. 599; *Powell* v. *London & Prov. Bank*, '93, 2 Ch. 555.

[6] Per Lord Selborne, *Société Générale* v. *Walker* (1885), 11 App. Ca. at p. 30; per Lindley L.J., S. C., 14 Q. B. D. at p. 457; Lindley on Companies, 477. This rule does not of course affect the application of the principle of *Hopkinson* v. *Rolt* to mortgages of shares (*Bradford Banking Co.* v. *Briggs* (1886), 12 App. Ca. 29). And it may be a question whether the rule applies to companies governed by the Companies Clauses Act, 1845, s. 20 of which is not so explicit as s. 30 of the Companies Act, 1862. It will be noticed that in *Société Gén.* v. *Walker* and *Colonial Bank* v. *Whinney*, Lord Blackburn based his opinion almost entirely on considerations connected with the share certificates. As to the effect of a certificate, see *Shropshire Union Co.* v. *Reg.*, L. R. 7 H. L. 496; *Re Ottos Kopje Co.*, '93, 1 Ch. 618.

There remains the question whether 'chose in action' includes a right of action for tort, and whether the term ought to be extended to patents, copyrights, and similar kinds of property.

As regards rights of action for tort, Mr. Cyprian Williams's treatment of the subject in a recent number of this REVIEW [1] makes it unnecessary to consider it here. I would merely add that the article on choses in action in Jacob's Law Dictionary (which is the most compendious and accurate note on the subject which I have found in any law dictionary) expressly includes torts [2], and that Blackstone's definition is so incomplete as to be almost worthless. It excludes not only rights of action for tort, but such property as stock in the funds, or in a trading company, which had been settled to be a chose in action before Blackstone wrote; he also takes no notice of choses in action real. His treatment of the subject has not been adopted by his editors [3], and did not always commend itself to Sir Howard Elphinstone [4]. But it does not follow that 'chose in action' is always used in such a sense as to include rights of action for tort. On the contrary, the term as used in modern reports, statutes, and text-books prima facie means a right or property which is assignable. It would require some courage to seriously maintain that s. 25 of the Judicature Act, 1873, has made it possible to assign a right of action for tort. That section is clearly inapplicable to stocks, shares, patents, and other choses in action the title to which depends on a statutory register, and there is some doubt whether it applies to future rent [5].

As regards patents, copyrights, and similar forms of property, no writer on the subject, so far as I know, has included them among choses in action without an apology. The late Mr. Joshua Williams classified them as incorporeal property, and rightly so, because whether they are or are not choses in action for some purposes, their essential quality is that they are permanent property —not necessarily perpetual, but wholly different from such transient things as debts and other rights of action. It does not appear to have been decided whether they are choses in action or not, partly no doubt because no question could well be raised as to their assignability. It is clear that on the bankruptcy of the owner

[1] P. 143, supra.

[2] 'All causes of suit for any debt, duty or wrong, are to be accounted choses in action.'

[3] See the editor's note in the 21st edition of the Commentaries; Steph. Comm. ii. 11, note (C) (11th edit.); and Mr. Hadley's revision of Blackstone's chapter (Broom and Hadley's Comm. ii. 576 seq.).

[4] Elphinstone Introduction to Conveyancing (3rd edit.), 170. In Williams on Executors torts are included among choses in action.

[5] *Southwell* v. *Scotter* (1880), Week. N. 49; 49 L. J. Q. B. 356.

they pass to the assignee or trustee under the provisions of the various Acts relating to bankrupts[1], but whether they are 'things in action' within the reputed ownership clauses of the Bankruptcy Acts, 1869 and 1883, or within the doctrine of reduction into possession by a husband, are questions which do not appear to have been decided. It is however difficult to conceive that patents, copyrights, and trademarks can be 'goods' or 'chattels personal[2]' or 'chattels personal in possession[3],' when the alternative of classifying them as 'choses in action' is open to us[4]. The correct view, it is submitted, is that they are choses in action within the doctrines of reputed ownership and reduction into possession, and that in the case of a husband becoming entitled to them in right of his wife under the old law, they could have been reduced into possession by being registered in his name, by analogy to stocks and shares. This question is not likely now to arise.

The mode in which questions of priority relating to patents, copyrights, and trademarks should be determined is not very clear, owing to the loose way in which the Copyright Acts and the Patents, Designs and Trademarks Act, 1883, are drawn. As regards patents, designs, and trademarks, the register is in the nature of a register of title, for the registered proprietor in granting licenses or assigning or otherwise dealing with his privilege, does so subject to any rights appearing from the register to be vested in any other person[5], and although no trusts can be entered on the register[6], equitable assignments can be registered, at all events in the case of patents[7]. It seems to follow, first, that if *A* appears on the register as the proprietor and assigns his patent to *B*, the registration of *B* vests the patent in him free from all equities not appearing on the register, and secondly, that if *A*, instead of assigning the patent to *B*, gives him an equitable interest in it by a registered instrument, *B* takes priority over an equitable assignee under a document earlier in date, but either not registered at all, or registered after *B*'s assignment. In the case of copyright

[1] *Hesse* v. *Stevenson* (1803), 3 Bos. & P. 565.
[2] Bankruptcy Act, 1883, ss. 44, 168.
[3] Co. Litt. 351 b.
[4] The cases deciding that copyright came within the words 'goods and chattels' in the reputed ownership clauses of the old Bankruptcy Acts (*Longman* v. *Tripp* (1805), 2 B. & P., N. R. 67, 9 R. R. 617; *Ex parte Foss* (1858), 2 De G. & J. 230) are not very satisfactory, but they proceeded on the ground that 'goods and chattels' include 'intangible property,' that is, choses in action. On the same principle a policy of insurance was held to be covered by the words 'goods and chattels' (see *Williams* v. *Thorp* (1828), 2 Sim. 257; *Green* v. *Ingham* (1867), L. R. 2 C. P. 525); a policy being a thing in action is now excluded from the reputed ownership clause (*Ex parte Ibbetson* (1878), 8 Ch. D. 519).
[5] Patents Act, 1883, s. 87. [6] Sec. 85.
[7] Patent Rules, 1890, rr. 68, 71; *Re Casey's Patents*, '92, 1 Ch. 104.

in the United Kingdom, registration is only necessary to enable the proprietor to sue for infringements; it does not appear to affect the question of title or priority.

The chief result of this investigation is to confirm Sir Howard Elphinstone's conclusion that 'chose in action' is used in at least two meanings. Prima facie, it means a debt, or sum of money payable under a contract. It is so used in the Judicature Act, and also in ordinary parlance. We should never think of describing a transfer of stock as an assignment of a chose in action. In a more extended and technical sense, however, it includes shares and stocks; it is so used in the Bankruptcy Act, and in the old law of husband and wife. In a still wider sense it includes many rights which the old books treated as choses in action or 'things of that nature,' such as rights of action for torts, rights of entry, annuities, rights of presentation, &c., and also (it is submitted) some rights of more modern origin, such as patents, copyrights, and trademarks.

Possibly, too, a moral may be drawn from the history of choses in action, and that is, that parliamentary draftsmen should not use technical terms without knowing what they mean.

Following the example of Sir Howard Elphinstone, I have not attempted to deal with equitable choses in action. This branch of the subject is much less difficult—and less interesting—than choses in action at common law.

CHARLES SWEET.

WHAT IS A THING?

THE question what is a Thing is much less simple than the question what is a Person. Roman law will tell us that some things are corporeal and others incorporeal; the Common Law will tell us that some things are in possession and others in action. The Roman division is easier on a first view; the English one is no doubt subtler, less clearly defined, and more difficult for beginners to grasp. It is therefore commonly assumed that the Roman conception is rational and the English is not. We must have a little patience before we are ready to form an opinion.

A thing is, in law, some possible matter of rights and duties conceived as a whole and apart from all others, just as, in the world of common experience, whatever can be separately perceived is a thing.

The kind of 'things' with which we are most familiar are material sensible objects which can be dealt with in the way of manual use. No difficulty occurs in treating a house, a book, or a sheep, as things. As borrower of a book, I have the right of keeping the book for the agreed time, or until re-demanded, and the duty of returning it. The book is plainly not the same as my rights, or any one's, regarding the book, or the sum of all possible rights. It would still be a real book if it belonged to nobody. We are not now considering what the possible rights, of ownership or otherwise, may be. We take it provisionally as common knowledge that an owner who has not parted with any of his rights has large powers of use and disposal over the thing owned, powers which are indefinite even though they may be limited in certain directions by rules of law.

There is no trouble, again, in extending this notion of a 'thing' to an aggregate of material things, such as land with a house and other buildings on it, a library with all the books in it, a flock of sheep. Any of these aggregates may be treated as a single thing if we find it convenient. Physical continuity is in no way essential to the identity and singleness of the rights existing over material objects. Physical discontinuity makes it, no doubt, easier to separate those rights and form new combinations; but easier only in degree. One sheep may be bought and driven off from the flock; one chair out of a set may be sold or given away. But also

when the sheep becomes mutton each leg of mutton may have a separate owner; and a chimney in a house may be repaired and the old materials taken by the builder in part payment, or a whole wing of the house may be rebuilt and the materials sold in lots.

So far we have spoken of things (as Littleton said) whereof a man may have a manual occupation, possession, or receipt[1].

But many elements of wealth are not tangible, as we know without assuming any special knowledge of law. The worth of five sovereigns is in the gold; the worth of a five-pound note, and the reason why we can get five sovereigns for it, is in the credit of the Bank of England. Whatever debts are owed to an individual, a firm, or a corporation in the course of business are part of the assets of the business. Nay more, the goodwill of a business, which is merely the right to go on using the old name, coupled with the expectation that custom will still follow the name, is often of great pecuniary value.

Then we have exclusive rights which, though not merely personal, are only remotely connected with any tangible thing, and consist in the legal power of excluding others from competition in respect of their subject-matter. One may have an exclusive right to take fish in a certain piece of water, to ferry passengers across a river for hire at a certain place, to make and sell a new machine or instrument, to multiply and sell copies of a book or a print. Again we may have rights over tangible things which belong to others; rights of way over land, rights of using or detaining goods by way of loan, hire, or pledge, and others. These rights can be and are regarded in law as having distinct and measurable values, and whatever has such value is a thing, though not a bodily and sensible thing. These benefits can be part of a man's inheritance or goods, of his 'estate and effects,' to use the largest term known to our law; they are capable of transmission and, for the most part, of voluntary alienation. We must recognize as things, in fact, all objects of exchange and commerce which are recognized by the usage of mankind.

It is often said that such things have no being save in contemplation of law: the Roman phrase is 'in iure consistunt.' But this is not accurate: for there may be 'groups of advantages,' to use Professor Holland's happy term, which have an appreciable value though the law does not recognize them. Imperfect rights of the nature of copyright, for example, might exist outside the law by usage and courtesy. Such rights did in fact exist in the United States to a certain extent before the Copyright Act of 1891,

[1] Litt. s. 10.

as regards English books made over to American publishers; and they had a certain value to the American publisher, and consequently to the British author, although they were wholly unprotected by law, and (as events showed) precarious in fact. The goodwill of a business, again, would still have a commercial value if it were less efficiently protected by law than it is; and it would probably by no means lose the whole of its value even if it were not protected at all. The law began to protect it when it became notoriously valuable and not before. Hence it seems that in the case of incorporeal things the advantage or 'group of advantages' enjoyed or to be enjoyed in fact is the true subject-matter of the right, and corresponds to the tangible object which we call a corporeal thing as distinct from the rights exercised over it. Of course the value of an incorporeal thing may be largely due to its recognition and protection by the law, and some incorporeal things may be called creatures of the law. But no one will suppose that the value of tangible property would not also be diminished if the law should cease to punish theft, or to decide questions of title. The parallel therefore seems to hold good notwithstanding the possible anomalies of extreme cases.

At this point it may be worth considering, at the risk of an apparent paradox, whether corporeal things themselves are so corporeal as we think at first. For a material object is really nothing to the law, whatever it may be to science or philosophy, save as an occasion of use or enjoyment to man, or as an instrument in human acts. In fact there are parcels of terrestrial matter which are not things in the law. Of some such parcels, on grounds of necessary convenience, we have to say 'communia sunt omnium,' the water of the high seas for example: of other such we say, for reasons of religion or state, 'nullius in bonis sunt.' This is much easier to illustrate from the Roman law than from our own; for the Common Law abhors a vacuum of property: a statement which the reader, unless he be already learned in the law, must provisionally take for granted. A thing which belongs to nobody is of no legal importance until something happens to bring a person into relation with it, and make it the subject-matter of enforceable rights. An old iron pot thrown away and dropped at the bottom of a canal, for example, might well be no more to the law than if it were in another planet. If it is something to the law, it is because the local law may happen to provide, as ours does, that abandonment shall not wholly destroy or suspend the legal qualities of a chattel which has once been a thing of value. So that on the whole perhaps we have good ground for saying that the 'thing' of legal contemplation, even when we have to do with

a material object, is not precisely the object as we find it in common experience, but rather the entirety of its possible legal relations to persons. We say entirety, not sum, because the capacity of being conceived as a distinct whole is a necessary attribute of an individual thing. What the relations of a person to a thing can be must depend in fact on the nature of the thing as continuous or discontinuous, corporeal or incorporeal, and in law on the character and the extent of the powers of use and disposal which particular systems of law may recognize. A man who has copyright in a book can alienate but cannot destroy the copyright, though he may choose, on some scruple of conscience against monopoly in spiritual benefit[1], not to exercise his right or reap the profit of it. The owner of an unique manuscript can destroy it in fact, but the law might conceivably forbid him to do so, and probably would if the obvious interest of those to whom things of unique value belong were not thought to be sufficient security against wanton destruction. Land, though it can be wasted or, in some situations, flooded, cannot be destroyed in the same sense as ordinary chattels; and some few chattels, such as the harder kinds of gems, may be considered indestructible as compared with perishable goods and even with relatively lasting materials of common use. Through all the range of natural and legal diversities, however, a thing remains, for the lawyer's purposes, that which is attributed by law to the natural or conventional thing in regard to the rights and duties of persons.

Here, then, we seem to have a necessary point of contact between law and philosophy. The lawyer as well as the metaphysician is driven, when he takes to thorough-going analysis, to face idealism. What we commonly call things are resolved by philosophical analysis into possibilities or occasions of perception. The idealist boldly says that the *esse* of material things is *percipi*. So we may say that in contemplation of law the *esse* of things is *haberi* or *in bonis esse*. That only is a thing which can, in the widest sense, be owned: it must be the subject-matter of rights that the law will recognize. An ownerless thing is for the lawyer pretty much what a 'thing in itself' is for the philosopher. A *res nullius* is as void of legally intelligible contents as is a *Ding an sich* of intelligible contents of any kind. It is merely negative and irrational; the very notion of it excludes it from the world of rational import. We can see in it, at most, the potency of a future legal significance. The 'books in my closet,' in Berkeley's famous example, are merely the potentiality of the books I shall see when I open the closet. And so the ownerless abandoned thing, in systems which admit the

[1] Count Lyof Tolstoi not long ago disclaimed all interest in the copyright of his works for some such reason.

extinction of property, is the mere potentiality of possession or ownership to come, whether the thing itself be buried treasure or a worthless tin pot. There is a legal vacuum till the act of an occupier or finder restores the thing, so to speak, to the world of legal reality. Hence, if we find in a particular system of law rules which are astute even to refinement to prevent this state of vacuum, there is no reason to treat such an endeavour as absurd. In fact the old masters of the Common Law did take the line of abhorring vacant possession or property, and put forth extreme ingenuity to avoid admitting it. Without contending that they were consciously led by any philosophic reason, one may be allowed to think that, whether by scientific instinct or by good fortune, they showed themselves on this point at least as good philosophers as the Roman lawyers.

The foregoing remarks are, as they stand, a fragment; but they may have some bearing on the difficult speculative and historical problems raised by the common law doctrine of 'things in action,' which are now under discussion in this REVIEW. My own opinion, so far as I have formed one, inclines to the conclusion that our English 'thing in action' will be found to be really equivalent in its conception to the Roman Obligation, but that the idea has been much perplexed in its application, like almost all the subtler ideas met with in English law, partly by historical accidents and partly by ignorance.

FREDERICK POLLOCK.

THE QUASI-GRANT OF EASEMENTS IN ENGLISH AND ROMAN LAW.

OF late years the Courts have on several occasions dealt with the rights and liabilities *inter se* of purchasers from the same vendor of adjoining tenements, and after some considerable conflict of judicial opinion the law is tolerably well settled. The difficulty arises in this way: The owner of the adjoining tenements has enjoyed quasi-easements or rights analogous to easements in respect of one tenement over the other: he conveys one or both of the tenements to purchasers: how far do the rights which before the severance of ownership were quasi-easements become, after the severance, actual easements, independently of prescription or express grant? The question, said Chitty J., 'is not like the case of an implied grant where, upon reading the instrument, you say the terms employed mean so and so; and it is necessary in order to give effect to the intention, as manifested by the deed, to imply something which is not expressed in so many words[1].' In truth, if the quasi-easements are transformed into actual easements, they are so transformed, not by express grant nor by implied grant in the correct sense of the term, but by quasi-grant. The obligation or right arises neither from the express words of the instrument, nor from that which, having regard to the circumstances, must be considered the true meaning and effect of the words of the instrument, but from the position into which the parties have placed themselves by their contract. That is to say, after an examination of the surrounding circumstances the law imputes to the parties an intention that the quasi-easements enjoyed by the joint owner shall or shall not be transformed by the severance of the tenements into actual easements.

This problem has exercised the English Courts during some centuries, but it is not necessary to discuss the cases which are scattered in considerable profusion about the Year Books and the older series of reports: in these latter days controversy has settled round the vigorous judgment of Lord Westbury in *Suffield* v. *Brown*[2].

If an owner of two adjoining tenements enjoys in respect of one quasi-easements over the other, then the former is said to be quasi-

[1] *Beddington* v. *Atles*, 1887, 35 Ch. D. p. 326.
[2] 1864, 4 De G. J. & S. 185.

dominant and the latter quasi-servient. In the alienation of the two tenements either the quasi-dominant or the quasi-servient may be granted before the other, or both may be granted at the same time. The judges had, from time to time, noticed the possibility of these three cases, and the distinctions between them. One example will suffice. In *Palmer* v. *Fletcher*[1], where the owner of a house and adjoining land had conveyed the house to one and the land to another, Kelynge J. said, 'Suppose the land had been sold first and the house after, the vendee of the land might stop the lights;' but Twysden J., to the contrary, said, 'Whether the land be sold first or afterwards, the vendee of the land cannot stop the lights of the house in the hands of the vendor and his assignees;' and cited a case to be so adjudged. The point was not further pressed by Kelynge J., who held the view that the Courts have adopted; and before the latter half of this century there was no direct decision that the rights and liabilities of the purchasers depend on the order in time of the alienation of the tenements.

In *Pyer* v. *Carter*[2] the Court of Exchequer decided that if the owner of two adjoining houses sells first one house and then the other, and the house last sold is drained by a drain running under the house first sold, the second purchaser is entitled to the ownership of the drain, that is to a right over the freehold of the first purchaser. There the quasi-servient tenement was sold first, and the Court held that the right to the drain was reserved by implication for the owner for the time being of the quasi-dominant tenement, and gave as the reasons for the decision that the purchaser takes the house 'such as it is,' and that if he had inquired he would have discovered the existence of the drain.

In *Suffield* v. *Brown*[3], the right claimed was peculiar. The owner of a dry dock and an adjoining wharf at Bermondsey had been accustomed to allow the bowsprits of the vessels in the dock to overhang the wharf to the extent of some fourteen feet. The wharf, the quasi-servient tenement, was sold to the defendant, and the dock, the quasi-dominant tenement, was sold some years after to the plaintiff. The defendant commenced to build on the wharf up to the edge of the dock. The purchaser of the dock filed a bill to restrain the purchaser of the wharf from building in such a way as to interfere with the plaintiff's enjoyment of 'the privilege right or easement of allowing the bowsprits of the vessels in the plaintiff's dock to overhang the defendant's wharf to the extent of fourteen feet.' Lord Romilly gave judgment for the plaintiff, and after referring to *Pyer* v. *Carter*[4] with approval, said, 'That case also

[1] 1675, 1 Levinz 122, 1 Siderfin 167, 1 Keble 553.
[2] 1857, 1 H. & M. 916. [3] 1864, 4 De G. J. & S. 185. [4] 1857, 1 H. & M. 916.

established that no distinction can be founded on the circumstance that the servient tenement was sold prior to the sale of the dominant tenement, which indeed only results in a question of notice.' On appeal the Lord Chancellor reversed this decision with something like judicial contempt. He declined to agree with the remark of the Master of the Rolls quoted above, and drew a sharp distinction between the cases where the quasi-servient tenement was sold first, and the cases where the quasi-dominant tenement was sold first. Lord Westbury allowed that in the latter class of cases there was no objection to the rule that neither the vendor nor his assignees could interfere with the purchaser in the enjoyment of the continuous and apparent rights in the nature of easements which had been enjoyed by the joint owner before the severance, on the ground that the vendor cannot derogate from his own grant. But with regard to the former class of cases he said, 'The effect of the judgment under appeal is that if I purchase from the owner of two adjoining tenements the fee simple of one of those tenements, and have it conveyed to me in the most ample and unqualified form, I am bound to take notice of the manner in which the adjoining tenement is used or enjoyed by the vendor.' The Lord Chancellor suggests an example, which is a *reductio ad absurdum* of the position taken by the Master of the Rolls: 'Suppose the owner of a manufactory to be also the owner of a strip of land adjoining it, on which he has been for years in the habit of throwing out the cinders, dust, and refuse of his workshop; and suppose I, being desirous of extending my garden, purchase this strip of land and have it conveyed to me in fee simple, and the owner of the manufactory afterwards sells the manufactory to another person, am I to hold my piece of land subject to the rights of the grantee of the manufactory to throw his rubbish upon it?'

In answer to the learned Barons who decided *Pyer* v. *Carter*[1], Lord Westbury argued that the purchaser took the house not 'such as it is,' but 'such as it is described' in the contract and conveyance, and that having regard to the terms of the contract and conveyance, the purchaser in that case was under no obligation to make any inquiry as to the existence of the drain. In a brilliant passage, 'the first introduction of this extraordinary doctrine' which had been affirmed by the Court of Exchequer and the Master of the Rolls, is traced to the comparison of the disposition of the owner of two tenements to the destination *du père de famille* of the French civil code[2]. According to this comparison the owner of the entire estate which is afterwards severed stands in the relation

[1] 1857, 1 H. & M. 916.
[2] Gale on Easements, first edition, 1839, ch. 4.

of *père de famille*, and impresses upon the different portions of the estate mutual obligations and services which accompany such portions when divided among the members of the family, or even when aliened to strangers. But Lord Westbury would have none of this. 'This comparison is a fanciful analogy from which rules of law ought not to be derived. And the analogy, if it be worth grave attention, fails in the case to be decided, &c.'

This statement of the law is clear and definite, and was confirmed by Lord Chelmsford in *Crossley* v. *Lightowler*[1], but the question was again relegated to the region of doubt by the remarks of the Lord Justices during the argument in *Watts* v. *Kelson*[2]. The counsel for the appellants cited *Suffield* v. *Brown*[3], and Mellish L.J., who as counsel had doubtless had no small influence in persuading Lord Westbury to his decision, interposed with the remark, 'I think that the order of the two conveyances is immaterial, and that *Pyer* v. *Carter*[4] is good sense and good law. Most of the common law judges have not approved of Lord Westbury's observations on it;' and James L.J. added, 'I also am satisfied with the decision in *Pyer* v. *Carter*.' The period of doubt continued for nine years, during which bewildered practitioners, ignorant which view would ultimately prevail, had to advise their clients either in accordance with the recorded decisions of two Lord Chancellors, or in accordance with the later reported opinions of two Lord Justices. In 1879 the Court of Appeal again had an opportunity, and this time spoke with no uncertain voice.

In *Wheeldon* v. *Burrows*[5] the owner of a workshop and adjoining land sold the land, the quasi-servient tenement, in November 1875, and the workshop, the quasi-dominant tenement, in April 1876. Some of the windows of the workshop had overlooked and received their light from the adjoining piece of land. The purchaser of the land blocked up the windows with a hoarding. Bacon V.-C. and the Court of Appeal held that he was entitled to do so, thus adopting the view taken by Kelynge J. in opposition to Twysden J. in *Palmer* v. *Fletcher*[6]. In an elaborate judgment Thesiger L.J. reviewed all the cases from *Palmer* v. *Fletcher* onwards, and in the result *Pyer* v. *Carter*[7] was definitely overruled, and the judgment of Lord Westbury in *Suffield* v. *Brown*[8] approved. James L.J., who was a member of the Court who heard the appeal in *Wheeldon* v. *Burrows*[9], appears to have retracted the opinion expressed by him in *Watts* v. *Kelson*[10].

[1] 1867, L. R. 2 Ch. 486.
[2] 1870, L. R. 6 Ch. 170.
[3] 1864, 4 De G. J. & S. 185.
[4] 1857, 1 H. & M. 916.
[5] 1879, L. R. 12 Ch. D. 31.
[6] 1675, 1 Levinz 122.
[7] 1857, 1 H. & M. 916.
[8] 1864, 4 De G. J. & S. 185.
[9] 1879, L. R. 12 Ch. D. 31.
[10] 1870, L. R. 6 Ch. 166.

There remains the class of cases where the two tenements are alienated at the same time, e.g. at a sale by auction: and here it may be remarked that in this connexion the important date is the date of the contracts, and that the dates of the execution of the subsequent conveyances are immaterial (*Beddington* v. *Atlee*[1]). In *Swansborough* v. *Coventry*[2], Tindal C.J. said: 'In the present case the sales to the plaintiff and defendant being sales by the same vendor and taking place at one and the same time, we think the rights of the parties are brought within the general rule of law that a vendor shall not derogate from his own grant.' This case followed *Compton* v. *Richards*[3], and was followed by Jessel M.R. in *Allen* v. *Taylor*[4], and approved by the Court of Appeal in *Wheeldon* v. *Burrows*[5]. It decides that where the grants are contemporaneous and part of one transaction, each grantee is in the same position as if he had obtained the first grant. This view of the law was applied by Chitty J. to two persons claiming under a will which 'operates as a simultaneous conveyance' of the two tenements to the devisees (*Philips* v. *Low*[6]).

In the result the law is well settled to this effect. (*a*) If the quasi-dominant tenement be granted first, there will pass to the grantee, without express words, all those continuous and apparent quasi-easements which are necessary to the reasonable enjoyment of the tenement granted, and which have been enjoyed before the time of the grant by the owners of the entirety for the benefit of the part granted. (*b*) If the two tenements are granted at the same time it is as if the quasi-dominant tenement in respect of each of the quasi-easements had been granted first, and the vendor cannot derogate from his grant. (*c*) If the quasi-servient tenement be granted first, the quasi-easements are extinguished unless preserved by express words, except in the case of easements of necessity, such as a right of way to a landlocked tenement, which are excepted from the general rule on the principle 'cuicunque aliquis quid concedit, concedere videtur et id sine quo res ipsa esse non potest.'

It is somewhat curious that in no case did either counsel or judge refer to the position taken by the Roman lawyers. A reference to the Digest shows that in this particular case they had no sympathy with the doctrine that rights and liabilities could spring into existence by a quasi-grant unexpressed and to be collected from the circumstances surrounding the contract of alienation. They allowed that the owner of two tenements could, on

[1] 1887, L. R. 35 Ch. D. 317.
[2] 1832, 9 Bing. 305.
[3] 1814, 1 Price 27, 15 R. R. 682.
[4] 1880, L. R. 16 Ch. D. 355.
[5] 1879, L. R. 12 Ch. D. 31.
[6] 1891, 2 Ch. 37.

the alienation of one of the tenements, impose servitudes on one or other of them: but they required these servitudes to be clearly defined and expressed in the contract of alienation. 'Qui duas areas habet alteram tradendo servam alteri efficere potest[1].' 'Duorum praediorum si alterum ea lege tibi dederit ut id praedium quod datur serviat ei quod ipse retinet vel contra, iure imposita servitus intelligitur[2].' 'Si quis duas aedes habeat et alteras tradat potest legem traditioni dicere ut vel istae quae non traduntur servae sint his quae traduntur vel contra[3].' But if the two tenements were granted at the same time, by simultaneous grants or by will, the quasi-easements enjoyed before the severance were extinguished. 'Binas quis aedes habebat una contignatione tectas: utrasque diversis legavit. Dixi . . . ex regione cuiusque domini fore tigna nec ullam invicem habituros actionem, ius non esse immissum habere. Nec interest pure utrisque an sub condicione alteri aedes legatae sint[4].' 'Duas autem aedes simul tradendo non potest efficere alteras alteris servas quia neque acquirere alienis aedibus servitutem neque imponere potest[5].' It must be added that an exception was recognized in the case of an easement of necessity, without which the tenement to which the right was attached was incapable of any beneficial occupation. Marcellus put the case of the owner of two adjoining houses devising one house to a devisee: he had no doubt but that the heir could raise his house higher, and darken the lights of the devised house, but he added 'sed ita officere luminibus et obscurare legatas aedes conceditur ut non penitus lumen recludatur, sed tantum relinquatur quantum sufficit habitantibus in usus diurni moderatione[6].'

The civil law may be summarized shortly: if the alienation of the two tenements was simultaneous, the quasi-easements were extinguished in every case: if the owner alienated one tenement, the continuance or cessation of the rights depended on the contract of alienation, and those rights that were not expressly mentioned and reserved were extinguished. These rules were subject to the exception that in all cases the rights were preserved so far as was absolutely necessary for the beneficial occupation of the tenement in respect of which they had been enjoyed before the alienation.

The differences between the rules of English law and Roman law are obvious: it is submitted that the simple and intelligible rules of Roman law are more in accordance with sound legal principles than the complicated rules of English law, which neglect

[1] D. 8. 3. 34. [2] D. 8. 4. 3. [3] D. 8. 4. 6 pr.
[4] D. 8. 2. 36. [5] D. 8. 4. 6 pr. [6] D. 8. 2. 10.

the terms of the contract of alienation, attach undue importance to the circumstance, often accidental [1], of one contract being prior to the other, and render it necessary in each case to examine the circumstances surrounding the contract of alienation in order to decide whether or no the law will impute to the parties an additional contract which they did not make in fact, and which in many cases they did not intend to make, and would not have made if their attention had been called to the particular point [2]. Lord Westbury perceived that the contract of alienation (*lex traditionis*) ought on sound legal principles to govern the rights of the parties subsequent thereto. 'When the owner of two tenements sells and conveys one to a purchaser for an absolute estate therein, he puts an end by contract to the relation which he had himself created between the tenement sold and the adjoining tenement, and discharges the tenement so sold from any burden imposed upon it during his joint occupation, and the condition of such tenement is thenceforward determined by the contract of alienation, and not by the previous user of the vendor during such joint ownership [3].' The rules of English law are too well settled at this date, but it is suggested that it would have been well if the Courts had adopted the dictum of Mellish C.J., that 'the order of the two contracts of alienation is immaterial,' and had applied to all cases the rule of Roman law, that the quasi-easements will not be transformed into actual easements by the fact of alienation, but that their transformation must be an express term of the contract of alienation.

ERNEST C. C. FIRTH.

[1] The facts in *Pyer* v. *Carter*, 1857, 1 H. & M. 916, *Wheeldon* v. *Burrows*, 1879, L. R. 12 Ch. D. 31, and *Beddington* v. *Atlee*, 1887, L. R. 35 Ch. D. 317, establish that the priority of one contract is often accidental: e. g. two tenements are offered for sale at the same auction; one is knocked down there and then to a purchaser; the other is disposed of by private treaty a month afterwards: according to the rules of English law considerable consequences may follow from the accident that the latter was not disposed of at the auction.

[2] *Birmingham, Dudley and District Banking Company* v. *Ross*, 1888, L. R. 38 Ch. D. 295.

[3] *Suffield* v. *Brown*, 1864, 4 De G. J. & S. 185.

MAINTENANCE AND EDUCATION.

THE Courts have been asked from time to time, in cases of construction, to define the extent of a provision in terms of a yearly sum or of the proceeds of a fund, expressed to be made 'for the maintenance and education' of a person or group of persons, in the absence of indication, other than that afforded by the words themselves, of the intended duration of the benefit. The last judicial utterance that I can find in a case of this kind is that of Hall V.-C. in *Wilkins* v. *Jodrell*, 13 Ch. D. 564, decided in 1879. It is remarkable as expressing, (apart from authority,) a dissent from the opinion of Wood V.-C. in *Gardner* v. *Barber*, 18 Jurist 508 (1854), on the limitation of time of enjoyment which these words prima facie indicate. It is also remarkable as containing a criticism of the principal case on which Wood V.-C. relied, which made that case, in the opinion of Hall V.-C., irrelevant alike to *Gardner* v. *Barber* and *Wilkins* v. *Jodrell*. Shortly stated, in Vice-Chancellor Wood's opinion, such a provision as above mentioned for the maintenance and education of *A* ought to be considered as limited to the period of *A*'s minority, unless there is something in the context to extend it; in Vice-Chancellor Hall's opinion, such a provision should continue during the life of *A*, unless there is something in the context to confine it. Wood V.-C. considered his opinion to be supported by the authority of *Knapp* v. *Noyes*, Ambler 661, decided by Lord Chancellor Camden in 1768; Hall V.-C., while not impugning the authority or correctness of that case, was persuaded to take a view of it which enabled him to pass it by.

It is somewhat strange that the decision of Hall V.-C. should have excited so little comment, as the point is one of considerable interest and importance, and seems, from an inspection of the reports, to have arisen with some frequency. I venture to think that the point has for more than a century been covered by authority, that Wood V.-C., whose carefully considered judgment in *Gardner* v. *Barber* was never challenged until 1877, when Malins V.-C. in *Frewen* v. *Hamilton*, 47 L. J. (Ch.) 391, (presently to be noticed,) disregarded it in a rather summary fashion, was right, and that Hall V.-C. was not free to give effect to his own view. The fact that the decision in *Wilkins* v. *Jodrell*, and the consequences involved in that decision, have been noticed in various professional books in general use

(e.g. Jarman, Wills, 5th edition, i. 371, note (z); Lewin, Trusts, 9th edition, 146; Seton, Decrees, 5th edition, 1376; Simpson, Infants, 2nd edition, 315) without adverse comment, and in one case at least (Jarman, loc. cit.) with apparent approval, is my excuse for venturing on this criticism, which, if well founded, may be of some use when the point again arises. As it does not appear that Hall V.-C. would have been prepared to disregard or overrule the decision of Lord Camden if he had been convinced of its relevance, it is convenient to begin by examining that case, in which the Lord Chancellor is reported to have said that 'maintenance and education are confined to minority.' The examination will, I think, show that Hall V.-C. was wrongly advised when he professed his agreement with the argument of counsel that when Lord Camden used these words he was 'merely referring to the terms of the will then before him, being such that in that particular case they were so confined, and was not laying down any general rule that maintenance and education in such a clause or provision would ordinarily and *per se* determine with minority' (13 Ch. D. 571). And it seems to me not unimportant, as Wood V.-C., while relying on the words quoted from Lord Camden's judgment, spoke of them as 'only a *dictum*,' to examine the decision with some care in order that it may appear that these words were really something more than a *dictum*. It will after this examination be convenient to notice the chain of later cases, of which *Wilkins* v. *Jodrell* appears to be the last.

Knapp v. *Noyes*, Amb. 661, is a somewhat remarkable case. The judgment only is reported; it is short, and runs as follows:

'Noyes, having five children at the date of his will, gave them, by name, £1,500 each, to be paid to his daughters respectively at the time of their several marriages with the consent of his executrix and executor, or the survivor; and if any of them should marry without such consent, then he gave her or them so marrying respectively £500 only; and he gave the £1000 to such of his daughters as and when they should marry with such consent, in equal proportions.

'*Mary*, one of the daughters, having attained twenty-one, died unmarried. Q. Whether the portion survived? or, in other words, whether the time of payment is confined merely to marriage? If I should determine for the plaintiff it will be with reluctance. It is very unnatural for a parent to impose a consent to marriage during his daughter's whole life. To consider it upon the will, which I shall construe with liberality. These portions clearly vested at the death of the testator; and if they had not been devised over, I should think that in case any of the daughters had died before the time of payment, the portion would have gone to her representative.

'But still the question is, Whether marriage is the sole time of payment?

'A material observation arises on a clause in the will, by which the testator appointed the same persons who are his executors to be guardians of his daughters during their minority.

'It is a fair construction to say that he appoints the guardians merely with a view to their consent, and the same as if he had inserted that clause in the clause of consent.

'The clause of maintenance and education is also material. "*Till portions become payable*" must be understood, "*till twenty-one*, or marriage with consent."

'Maintenance and education are confined to minority; and though there may have been a case where under the word *education* the provision has been extended after twenty-one, yet that must have been a very special case, and contrary to the natural sense of the words. If this construction is right, it puts an end to the question; because the condition of marriage with consent must mean at an earlier time than twenty-one.'

Now it is to be observed that the decision ultimately arrived at by the Lord Chancellor is based on the conclusions extracted from certain indications in the will, independent of one another, but all, in the Lord Chancellor's opinion, pointing in the same direction. He argues on the antecedent unlikelihood of a testator intending to fetter his daughter's liberty of marriage during her whole life, and on the circumstance of the persons whose consent is expressed to be required being appointed to act as guardians during the daughter's minority, as though this exhibited the testator's intention to reduce the required consent to an incident of guardianship. He then relies on a further indication, which is the important point for us to notice. There was a 'maintenance and education' clause in the will, and seemingly the allowance for maintenance and education was to be made 'till portions become payable[1].' It is plain that the allowance for maintenance and education was not in terms expressed to be limited to minority, otherwise the last two paragraphs of the judgment would be pointless, as the Lord Chancellor would only have had to refer to the time-limit expressed in the will, instead of arriving at the same result by a roundabout method of inference. The argument appears to be this: 'The testator directed an allowance for maintenance and education until the portions should become payable—maintenance and education are words referable to minority in the absence of special circumstances—therefore portions must have been payable at majority, if marriage did not take place earlier.'

We are not in the least concerned with the correctness of this

[1] See the account of *Knapp* v. *Noyes* given by Wood V.-C. in his judgment in *Gardner* v. *Barber*, 18 Jur. 509.

reasoning, or with the reasoning on the other matters on which the Lord Chancellor relies in his judgment. Assuming the report to be in all points accurate—and perhaps this is a large assumption in the case of a precedent reported by Ambler—it may strike us with some surprise that the Lord Chancellor did not refer to *Atkins* v. *Hiccocks*, 1 Atk. 500, decided by Lord Hardwicke in 1737, a case which seems very much in point[1]. It also seems allowable to think that the words 'till portions become payable' displace under the circumstances the natural inference to be drawn (in the Lord Chancellor's opinion) from the use of the words 'maintenance and education.' But it seems clear that Lord Camden did not mean to say that from the particular will before him he collected a special intention of the testator that maintenance and education should only continue during minority. The words used, and the context in which they occur, require us to believe that in saying 'maintenance and education are confined to minority,' the Lord Chancellor was enunciating what he believed to be a known rule of interpretation, and applying it to a certain sentence in the will before him, extracting from this process a conclusion which, added to and agreeing with certain other conclusions extracted from other expressions in the will, justified him, (in his opinion,) in deciding that the portion of the deceased daughter of the testator survived to her representative. When we notice that the Lord Chancellor, as appears from the last paragraph of his judgment, regarded this point about the maintenance and education clause as important, if not decisive, it is difficult to regard the words 'maintenance and education are confined to minority' as a mere *dictum*[2].

[1] At the date of this judgment, Lord Camden, who is described by Lord Campbell as 'a profound jurist and an enlightened statesman,' had had a much longer experience as a common law judge than as an equity judge. See his life in Campbell's Lives of the Chancellors, vol. v.

[2] So clear did it seem to me after considering the judgment that Lord Camden intended to enunciate a general rule and not to deliver a particular interpretation, that I carefully examined all the reports of *Wilkins* v. *Jodrell* that I could find, with a view of learning, if possible, what was the nature of the argument by which counsel prevailed on Hall V.-C. to take the view of *Knapp* v. *Noyes* which he did. The case is reported in 13 Ch. D. 564, 49 L. J. (Ch.) 26, 41 L. T. 649, 28 W. R. 224, but none of these reports, either in the arguments or the judgment, throw any light upon the point. It is unlikely that the report in Ambler would be corrected or supplemented by a reference to the record without any reference to the fact in the judgment. In the report in Ambler, immediately under the title of the case, is the note [no entry], but as this is followed by a reference to a footnote which manifestly refers to the case immediately preceding, it is difficult to say to which case the reporter refers. I am inclined to suspect that counsel and judge in *Wilkins* v. *Jodrell* were misled by the headnote of *Knapp* v. *Noyes*, which runs as follows: 'Testator bequeathed to his daughters £1,500 each, to be paid them respectively at the time of their marriage with consent of his executrix or executor who are made guardians during their minority *with a clause for maintenance and education till twenty-one*. *Held*, a child attaining twenty-one her legacy was vested; the condition is to be understood as confined to marriage under twenty-one.' For the reasons already given, I think the provision for maintenance and education was expressed to continue 'till portions become payable,' and that, on the strength of

The next case to be noticed is not relevant to our point, so far as the matter decided in it is concerned, but it contains a *dictum* which has received some attention in later relevant cases. In *Badham* v. *Mee*, 1 Russ. & My. 631, decided by Leach M.R. in 1830, there was a devise to trustees upon trust to make out of the rents, &c., certain payments, and 'in the next place to pay, apply, and dispose of the rents, &c., unto and for the maintenance, education, and bringing up of *R. M.*, *S. M.*, and *J. M.*, the children of the testatrix' son *R. M.* during the life of her son,' residue of real and personal estate to other persons. *R. M.* the elder was living, *R. M.* the younger and *S. M.* were dead, *J. M.* had long since attained twenty-one. The question was, What interest, if any, had *J. M.* in the rents? The M.R. held that as the testatrix had fixed the life of *R. M.* the elder as the measure of the duration of the benefit, the surplus rents belonged to *J. M.* during *R. M.*'s life, but observed that 'the terms "maintenance, education, and bringing up," where no period was fixed except what was implied in the import of the words themselves, would have reference to minority.' It may here be noticed that the opinion implied in these words that, in determining the measure of a gift of this kind, the purposes expressed are to be read conjunctively 'as meaning that all the three things, maintenance, education and bringing up, are to go on together,' is criticized by Hall V.-C. as unsound. We shall see that Shadwell V.-C. and Malins V.-C., (though neither of them very consistently,) seem to be of the same mind as Hall V.-C. on this point.

In *Soames* v. *Martin*, 10 Sim. 287, decided in 1839 by Shadwell V.-C., a testator directed the interest of a sum of money to be applied for the maintenance and education of his nephew (an infant), making no disposition of the principal. The case is shortly reported, and *Knapp* v. *Noyes* does not appear to have been brought to the Vice-Chancellor's attention. *Badham* v. *Mee* was cited. The Vice-Chancellor, after saying that the nephew, in his opinion, took a life interest, added: 'In the case cited, the words were "maintenance, education and bringing up." These words necessarily apply to the infant state. But all persons who have attained twenty-one are not in a state in which they do not want education, and there is no period in life in which a person does not require maintenance.' It does not seem to have struck the Vice-Chancellor that a person, even when 'brought up,' might need education and maintenance. It may be noticed that the Vice-Chancellor seems to take a more

the meaning of the words 'maintenance and education,' it was held that the phrase must be interpreted 'till twenty-one, or marriage under.' As a statement of the text of the will, the words in italics in the headnote are plainly incorrect;—as a statement of the result arrived at in the judicial interpretation of the will, they are sufficiently correct, though, under the circumstances, calculated to mislead.

liberal view of the limits of education than he did seven years before in *Foley* v. *Parry*, 5 Sim. 138, and in the unnamed case referred to by Wood V.-C. in the case next to be noticed. Cf. the decision of Plumer M.R. in *Hamley* v. *Gilbert*, Jac. 354 (1821).

In *Gardner* v. *Barber*, 18 Jur. 508 (1854), certain questions arose on James Butler's will. The testator had given his real and personal estate to trustees to convert, and after certain payments to invest the residue, and out of the dividends to pay certain annuities to two of the testator's daughters during their lives, 'and upon trust that my said trustees shall from, with, and out of the said dividends, &c., pay and apply the yearly sum of £50, (and so in proportion for any less term than a year,) for or towards the maintenance and education of my granddaughter Amelia Lettice Barber,' (daughter of Amelia, another daughter of the testator,) 'in such manner as my trustees or trustee shall think proper.' The testator then directed a weekly allowance of two guineas to his daughter Amelia during her life. One question to be decided was as to the duration of the allowance to Lettice. Wood V.-C. referred to and gave an account of *Knapp* v. *Noyes*, mentioning that what he considered to be a *dictum* in that case, (which, with respect, for reasons given, I think an under-statement,) was supported by the *dictum* in *Badham* v. *Mee*; he referred with surprise to the decision in *Soames* v. *Martin*, observing that, in that case, *Knapp* v. *Noyes* was not noticed. He said (as the case is reported in 2 Eq. Rep. at p. 890), 'I must say that I think any one would have said, *prima facie*, that a gift of this description was intended during minority only.' He referred to *Foley* v. *Parry*, 5 Sim. 138, as indicating the proper extent of a provision for education, referring also to another case decided by the same judge, which I have not been able to find; he referred to and distinguished certain other cases, in which the words 'maintenance and education' exhibit the motive and purpose, but are accompanied by other expressions which furnish the measure of the gift. He noticed that in the case before him the other allowances were expressed to be given for life, and seemed to treat the absence of those words in the gift which he was considering as a significant omission. He also seems to have considered *Soames* v. *Martin* as in some respects distinguishable[1].

It ought perhaps to be noticed that in *De Crespigny* v. *De Crespigny*,

[1] It does not seem to have been observed by either counsel or judge that in the later part of the will as reported in the Jurist, there were discretionary powers given to the trustees to make certain allowances for maintenance and education with an express reference to minority. I suppose the circumstance might have founded an argument for either party. Shadwell V.-C. would have regarded it as a circumstance in favour of the extension of the allowance. See *Kilvington* v. *Gray*, 10 Sim. at p. 297.

9 Exch. 192 (1853, Pollock C.B., Parke, Alderson, and Platt BB.), a question arose upon a covenant in a deed of separation beginning, 'And for providing for the *maintenance* of the children of the said *H* and *C*,' whereby the said *H* was expressed to engage to 'pay the whole expense of the education, maintenance and support' of the children, except in certain specified events. It was held, without reference to any rule of construction, on the text of the covenant (and, with respect, considering the words used and the nature of the deed, I think rightly), that the obligation was not restrained to the minority of the children. The English cases do not appear to have been noticed by counsel, but one of them learnedly refers to Ulpian and the Civil Code. This case was noticed by Wood V.-C. in the course of the argument of *Gardner* v. *Barber*, vide 2 Eq. Rep. 889 [1].

It is also to be noticed that in *Presant* v. *Goodwin*, 1 Sw. & Tr. 544 (1860, Sir C. Cresswell), in which a question as to the persons entitled to administration depended on the solution of a previous question as to whether certain persons mentioned in a clumsily drawn will were residuary legatees, a direction that 'all my remaining property after the hereinafter mentioned legacies be placed in proper securities and appropriated to the education of my sister *J.*, the wife of *C. P.*'s, children as shall seem most beneficial to them, recommending, &c.,' was held to make those children residuary legatees. *Knapp* v. *Noyes*, and the other cases which I have referred to, were not noticed even by the counsel interested in restricting the children's interest. There is, of course, a distinction between the gift of a capital sum with a declaration of purpose and motive superadded, and a direction to apply a yearly sum, or the interest of a fund, to purposes which furnish the only indication of the measure of the intended benefit. It is old law that a gift to a person of a sum outright, *plus* a declaration of the motive and purpose of the testator, is valid, even though the fulfilment of the purpose is impossible. See *Barlow* v. *Grant*, 1 Vern. 254, *Barton* v. *Cooke*, 5 Ves. 463, referred to by Sir C. Cresswell.

In *Frewen* v. *Hamilton*, 47 L. J. (Ch.) 391 (1877, Malins V.-C.), the point again fairly arose in connexion with the interpretation of a marriage settlement. It is unnecessary for our purposes to set out the provisions of the settlement, which were somewhat complicated. I venture to think that the decision was right, as the settlement, when carefully read, seems to me to contain indications

[1] Passing over questions of textual difference, it hardly needs pointing out that the considerations respectively applicable to the determination of the extent of a covenantor's liability on his personal engagement, and to the adjustment of the respective quantities of interest to be taken by persons other than the settlor having conflicting claims on a definite fund *in medio*, are not quite the same.

that the provisions for 'maintenance and education' were intended, in effect, to create life interests. These the Vice-Chancellor does not remark upon, but his judgment is noticeable for the way in which he deals with the authorities. After commenting on the extended views taken of education nowadays, he quotes the judgment in *Soames* v. *Martin* with emphatic approval, apparently also agreeing with the *dictum* in *Badham* v. *Mee* already noticed. He says, referring to the provision in *Badham* v. *Mee*, 'It is to cease when he has been brought up, and a person is brought up when he is of full age,' seeming here to fall into the same inconsistency as Shadwell V.-C. in *Soames* v. *Martin*. After adverting to the circumstances of the children in the case, he goes on to say, 'I do not agree with many of the observations that are attributed, very likely erroneously, to Wood V.-C. in *Gardner* v. *Barber*.' It will be observed that the Vice-Chancellor does not deal with *Knapp* v. *Noyes*, which had been mentioned in the argument. It is impossible to avoid thinking that this is a rather summary way of treating a considered judgment more than twenty years old, and it is not easy to see why doubt was thrown on the accuracy of the report of it[1].

The Vice-Chancellor further relied on the fact of the children being purchasers, distinguishing the case from cases of similar interests arising under wills. It is not altogether easy to see that, for the purpose of construing the limitations then under the notice of the Court, it mattered much whether the document containing them was a settlement or a will, and whether the persons interested in the question were purchasers or volunteers. As a matter of fact, the person claiming adversely to the children appears to have been equally a purchaser. And the case which the V.-C. mentioned of *Bowden* v. *Laing*, 14 Sim. 113, in which the interest of a residue was given to the testator's widow 'for the maintenance of herself and her children,' and it was held that a daughter who left home and married during the widow's lifetime had no claim upon the widow, seems distinguishable on other grounds than the difference between purchase and voluntary gift.

In *Wilkins* v. *Jodrell*, 13 Ch. D. 564 (1879, Hall V.-C.), already referred to, the point again fairly arose on the following set of facts: A testator by a codicil to his will bequeathed to *M. A. W.* 'an annuity of £100 a year . . . . . In the event of her death, the annuity is to be continued to her children for their maintenance and education. And I have to request Mr. *W. G.* . . . . to see it

[1] It may be that the Vice-Chancellor considered the Jurist, to the report in which he seems to have been referred, as not a very high authority. Besides being reported at length in the Jurist, the case is also reported at length in 2 Eq. Rep. 888, and more shortly in 2 W. R. 407 and 23 L. T. 128. There is no substantial variation so far as our point is concerned.

carried into execution.' *M. A. W.* survived the testator, and died leaving six children, all of whom had attained twenty-one. The question for the Court was, what, if any, was their interest in the fund which had been appropriated to provide the annuity of £100. It was attempted in the course of the argument to distinguish a provision for maintenance and education in the form of an annuity from a provision for similar purposes in the way of a trust. It does not seem that this distinction had any weight with the Vice-Chancellor (loc. cit. 570). Hall V.-C., after deciding that the provision for the children of *M. A. W.* was not conditional on *M. A. W.* predeceasing the testator, and that the annuity was not intended to be perpetual, proceeded to notice the view of Wood V.-C. and contrasted it with the view of Shadwell V.-C., and, (authority apart,) agreed with the latter. He expressed the view already adverted to, that 'maintenance and education' ought to be read as 'maintenance or education,' criticizing the *dictum* in *Badham* v. *Mee.* He then noticed the weight which *Knapp* v. *Noyes* had evidently had with Wood V.-C., taking the view of that case which has been already criticized. Considering then that *Knapp* v. *Noyes* was not relevant, and that the decision in *Gardner* v. *Barber* was based on a mistake, and that there was, moreover, in that case a special context, and noticing that the decision in *Soames* v. *Martin* was in accordance with his own view, he decided to follow that case, observing that he found no indications in the will and codicil before him strong enough to vary what he thought to be the prima facie meaning of the provision. He also referred to a class of authorities not really, it is submitted, relevant, as in them the association of an adult with infants in the enjoyment of a provision expressed to be for maintenance, would seem to rebut any presumption which might be drawn prima facie from the word, that the infants' interest was to cease at majority.

In the result the Vice-Chancellor held that the annuity continued during the lives of the children and the life of the survivor.

The case of *Wilkins* v. *Jodrell* well illustrates how serious a matter the settlement of the rule of interpretation in cases of this kind may be, as between persons with conflicting interests claiming under a settlement or will. As I have already stated, it does not appear that Hall V.-C. would have been prepared to overrule a decision, more than a century old, of the Lord Chancellor's Court, had he considered it relevant, whatever his own opinion might have been[1],

[1] In 1881, Malins V.-C. in *Re Hardy*, 17 Ch. D. 798, disagreed with and dissented from *Blower* v. *Morret*, 2 Ves. sen. 420, decided by Lord Hardwicke in 1752. But this departure met with austere disapproval in the judgments in *Cazenove* v. *Cazenove*, 61 L. T. 115 (1889, Kekewich J.), and *Re Schweder* '91, 3 Ch. 44 (Chitty J.).

or to disregard Wood V.-C.'s decision, but for the mistaken view of the earlier authority which he considered the V.-C. to have taken. And, taking the view which I do, after a close examination of the old case, and after noticing that it seems to have escaped attention in *Soames* v. *Martin*, a case which has seriously affected the decision in later cases, it might seem sufficient to submit that, when the case again arises of the construction of a provision for 'maintenance and education' occurring in a colourless context, it should be regarded as a proposition covered by authority that the majority of the beneficiary marks the farther limit of enjoyment[1]. But, authority apart, it seems a fair contention that the phrase 'maintenance and education,' which occurs in almost every will and marriage settlement in express connexion with the period of infancy, has, by usage, come to have a definite prima facie association with that period. If this is so, (and Wood V.-C. and Lord Camden seem to have thought so,) comments by other judges upon the modern methods of education, and the lifelong need of maintenance, and the propriety of reading the words conjunctively or disjunctively, would seem to lose a good deal of their force.

T. K. NUTTALL.

[1] I do not mean that, even in such a case, there might not be *extrinsic* facts—e.g. the full age, (known to the testator,) of the beneficiary at the date of the will—strong enough to warrant the Court in deciding that the intention was to confer a life interest.

SOME POINTS OF DIFFERENCE BETWEEN ENGLISH AND SCOTCH LAW.

NOTHING is so interesting to the man who studies the science of law for its own sake, as the comparison of different systems of jurisprudence. Where these systems have grown up side by side, and in immediate proximity to one another, as in the case of the legal systems of England and Scotland, the comparison becomes doubly interesting. Prior to the reign of Edward III the ideas of the Scottish jurists were largely influenced by the jurists of England, and the law of both countries developed very much on the same lines. A striking similarity is to be found in the legal systems of England and Scotland as they existed in the fourteenth century. In the reign of Edward III, however, political circumstances supervened, which threw Scotland into the arms of France, and from that time until the beginning of the present century, Scotland may be said to owe little or nothing to England in the matter of law. Within the last hundred years, however, a process of assimilation has been going on, which has tended to soften down the differences which exist between the law of England and that of Scotland, and if the two countries continue to remain subject to one Parliament, these dissimilarities may ultimately disappear. In passing the recent Sale of Goods Act, 1893, Parliament took one more step in this direction. It may not be uninteresting to describe some of the more prominent points of difference, which at present exist between the legal systems of the two countries.

In Scotland a promise to give, or deliver, or pay, or do, or abstain is binding without any preceding consideration, provided it is undertaken as a final engagement and not mentioned as a mere probable intention. In this respect the law of Scotland differs fundamentally from the law of England, which holds that obligations undertaken without consideration do not bind the parties. The result of the Scotch doctrine is that donations once made, otherwise than by last will or *mortis causa* are irrevocable, except between husband and wife. Again a person may be immediately and irrevocably bound by a delivered document to pay an annuity or legacy after the promisor's death. Gratuitous promises, however, are by statute liable to be declared void at the suit of a prior creditor, if the grantee is a near relation or confidant.

There is no statute similar to the English Statute of Frauds in

Scotland. Neither contracts for the sale of goods above the value of £10 nor contracts not to be performed within a year need be in writing. The sale of goods is effectually proved by verbal or written evidence or by admission of the party to be charged. When the bargain is made by the principal without writing, the evidence of two witnesses, or one corroborated by circumstances, is necessary, or the letters of the party, holograph or signed by him, are good proof. The English rule requiring that the consideration should be stated in contracts for the sale of land, and in consideration of marriage, and in promises by executors, is unknown in Scotland. As no consideration is necessary to a contract, none need appear in writing. Again in England if *A* makes an offer to *B* and *B* asks for time to consider, *A* having received no consideration for waiting need not do so. In Scotland *A* must wait because no consideration is necessary to support the contract. Scotch law requires, however, that contracts for the sale of land, copyright and ships should be in writing. In America the English Statute of Frauds has been generally adopted. In France the law of sale is not very different from that of Scotland. Verbal evidence is admitted, but with jealousy and caution. The law of Holland most nearly resembles that of Scotland.

There are no bills of sale in Scotland, except in connexion with the transfer of ships. Possession presumes property in moveables, or goods and chattels, to give the English equivalent. Where the possession of moveables is retained, neither an instrument of possession nor actual delivery, if the thing be immediately restored, has any effect in passing the property so as to counteract the presumption of property arising from possession. It is on this principle that in Scotland a factor in possession of goods has at common law a power to pledge, which in England is given by statute. A person, however, may acquire moveables by purchase, for example the furniture of an inn, and take delivery through a tenant or other bailee and leave them in his possession on a contract of hire and purchase without exposing them to the danger of being seized by the tenant's creditors.

In Scotland it is a condition implied that goods shall be fit for the purpose for which they are bought and such as they are represented or taken to be, according to the fair understanding of the parties. When the thing bought is produced to the buyer, the rule *caveat emptor* applies in Scotland as in England. Formerly the law of Scotland held that in contracts of sale the Roman maxim *caveat vendor* applied. In every contract of sale there was, according to the old Scotch law, an implied condition that the thing sold was merchantable and fit for the purpose for which it

was sold, and the seller, though quite ignorant of the latent defect, and though the goods had been examined by the purchaser, was liable if it should turn out that the article was substantially defective. In 1856, however, by the Mercantile Law Amendment Act (19 & 20 Vict. c. 60), the law of Scotland was assimilated to that of England and *caveat emptor* became the rule in the north as well as in the south.

Until quite recently a warranty was regarded in Scotland, not as a mere collateral contract, but as an absolute qualification of the contract of sale. If a man bought a horse with a warranty of soundness and the horse proved unsound, his only remedy was to return it. He could not keep it with an abatement of the price. By the Sale of Goods Act, however, it has been enacted, that a buyer may either reject the goods and treat the contract as repudiated, or he may retain them and claim compensation in damages.

In Scotland a deed need not be sealed. Sealing fell into disuse towards the end of the sixteenth century. A mark or cross is not a sufficient signature to a deed in Scotland. A deed thus signed is null. In the case of a person who cannot write, the deed must be executed by two notaries before four witnesses. The party must touch the notaries' pen in token of authority or must acknowledge it before the witnesses. In Scotland no distinction exists between specialty and simple contract debts. The doctrine that a simple contract merges in a specialty is unknown in Scotland. The distinction in Scotland is not between contracts under seal and simple contracts, but between contracts in writing and verbal contracts. By Scotch law a writ, whether a deed or not, can only be set aside by another writ.

According to Scotch law a mistake of law as well as of fact invalidates a contract, when its existence excludes real consent. The mistake of law, however, will not always entitle to restitution after the contract is fulfilled or money paid. If there is bona fides and money is paid with full knowledge of the facts, though there is no debt, it cannot be recovered back, merely because paid in ignorance of law, unless the circumstances are such as to render it inequitable for the party receiving the money to profit by the mistake of the other. In England the maxim *ignorantia juris neminem excusat* applies to cases of error in contract as well as to payment of money in error. The application of the English rule, however, has in practice been much restricted, and it may almost be said that in this matter the English and Scottish law are practically in harmony.

In Scotland a company is a distinct entity, separate from the

partners, and competent to maintain relations with third parties by its separate name or firm. The partners are regarded simply as sureties or 'cautioners,' to use the Scotch term. The firm may stand in the relation of debtor or creditor to any of its partners and can sue and be sued by any of them. Two firms having one or more members in common may sue each other. In England since 1876 actions may be brought by and against partners in the name of their firm, but this change of practice does not alter the old doctrine of English law, which refuses to recognize the firm as a separate person.

In Scotland trespass is not actionable without malice or substantial damage. The only way of enforcing right of possession and excluding intruders, is by obtaining an interdict, or, as it is called in England, an injunction, against the trespasser. The only penalty to which the trespasser is subject (apart from destruction of property or malice), is the expense of the application for the interdict. The interdict will only be granted in case of a well-founded application, and where there is reasonable apprehension that the trespass will be repeated. Thus in 1885 where a shoemaker in Ross-shire allowed a pet lamb belonging to him to stray on to the skirts of a gigantic deer forest, extending over 200,000 acres, and the lessee of the forest applied for an interdict against him, the Court of Session declined to grant it. The use of force to eject a trespasser is unlawful and would found a claim for damages at his instance. There is no Scotch maxim corresponding to the English one, that 'the Englishman's house is his castle.' In the eye of the law of Scotland, a Scotchman's house is not his castle. A bailiff has an absolute right of opening shut and lock-fast places.

Scotch law permits a direct action for seduction, a claim for which may be combined with a claim for breach of promise. A husband may sue the seducer of his wife on the ground of loss of her society and of domestic unhappiness and of injury to the family. A decree of divorce need not precede the claim. Scotch law knows no distinction between libel and slander. According to Scotch law, in an action for defamation there are two matters to be taken into account in considering the question of damages, namely, the injury or loss suffered actual or probable, for which reparation is sought, and the insult and offence to the individual for which a solatium is due. Thus in Scotland an action lies for a slander contained in an unpublished letter sent to the pursuer or uttered to himself when no other person is present. But words which would found an action if addressed to a third party, may not do so when addressed to the party himself, who complains of them.

It need hardly be said that English law considers the pecuniary loss only, in giving damages for defamation.

By Scotch law marriage is a consensual contract requiring no particular solemnity nor even written evidence, but deliberate and unconditional consent alone. There is no absolute necessity for publication, or solemnity, or celebration, or particular place or time of celebration [1]. Marriages may be regular, clandestine or irregular. Certain forms defined by statute have to be observed in order to constitute what is called a *regular* marriage. A regular marriage is one celebrated by a clergyman before two witnesses after the publication of banns or notice to the Registrar. It may be celebrated in a private house, at any hour of the day or night, and no particular form of words is necessary. A marriage celebrated by a clergyman without publication of banns or notice to the Registrar is called a clandestine marriage, and both the parties and the clergyman are liable to penalties. The marriage, however, is perfectly valid. A marriage may also take place by mere consent without a clergyman. Such a marriage is called an irregular marriage. It may be constituted (1) by declaration *de praesenti* before witnesses or by written acknowledgement of the parties, or (2) by promise *subsequente copula*, or (3) by cohabitation with habit and repute, or in other

[1] In England till 1753 the contract of marriage was as little encumbered with forms as in Scotland. Hence arose the notorious 'Fleet' marriages, which became so great a scandal, that in 1753 the Act 26 Geo. III. c. 33 was passed with the view of putting an end to them. A number of clergymen who were confined in the Fleet prison for debt, supported themselves by marrying any couple who applied to them, without licence or banns. The clergyman was liable to a penalty of £100, and to suspension, but the marriage was good. The Fleet clergy were not likely to be deterred by fear either of the penalty or the suspension. They had nothing to lose, and the marriage was valid whether the clergyman was suspended or not. Many of the marriages were entered into by unmarried women or widows, who wished to transfer the burden of their debts to their husbands. The parsons were quite willing to manipulate the register if the parties so desired. After the abolition of the Fleet marriages, the registers, such as they were, passed from hand to hand till 1821, when they were purchased by Government. Prior to the purchase by Government the possessors of many of these registers made a business of advertising them as open to the search of parties interested. Some curious entries are to be found. One parson records that the parties 'stole my clothes-brush.' In the case of another marriage, 'the woman ran across Ludgate Hill in her shift,' in pursuance of a popular but erroneous belief that a man was not liable for his wife's debts if he married her in this dress. In another instance there was a 'Mare upon Tick.' In yet another case the supposed husband 'was discovered after the ceremony was over to be in person a woman.' In case of a successful imposture of this kind the wife got rid of her debts without being burdened with a husband. In a certain bigamy trial it was sworn by one of the witnesses that anybody might have a certificate at a certain house for half-a-crown without any ceremony of marriage whatever, and have their names entered in the book for as long time past as they pleased. The parties were sometimes married by their Christian names only. It is said that heiresses were occasionally abducted and married by force. The clergymen were often men of good breeding and education. One Fleet parson, Dr. Gaynam, popularly known as 'the bishop of Hell,' appearing as a witness in a bigamy trial, and being asked if he was not ashamed of his vocation, replied, with a bow, 'Video meliora, deteriora sequor.' In 1753, by the passing of the Act 26 Geo. III. c. 33, these Fleet marriages came to an end.

words by the parties living together as reputed husband and wife. In the case of the first class of irregular marriages, the consent of both parties must be clearly expressed or implied. Thus if *A* says in presence of witnesses, 'this is my lawful wife,' and she curtsies in assent, this is sufficient. The consent may also be implied from such conduct as the man's living with the woman, or putting her at the head of his table. It is not clearly settled whether a promise *cum copula sequente* amounts to marriage, or is merely a ground for a suit to declare marriage. It is probably the latter. Such was the opinion of Lord Fraser, one of the highest authorities on Scotch matrimonial law. In order to constitute marriage by cohabitation with habit and repute, there must be cohabitation as well as repute, and the parties must mean and intend marriage, and be free from any legal impediment to marry[1].

The ease with which the matrimonial knot can be tied in Scotland led to the notorious Gretna Green marriages, which were such a source of trouble to parents in the good old days. There were several villages on the Scottish border to which fugitive English lovers were wont to direct their flight, but Gretna Green was of course the most notorious. The parties simply admitted before witnesses that they were husband and wife. The officiating functionary, who at Gretna Green was generally the blacksmith, signed a certificate of marriage which was also signed by two witnesses, and the marriage became by Scotch law absolutely indissoluble. The statute 19 & 20 Vict. c. 96 put an end to these Gretna Green marriages, by requiring that one of the parties should have resided in Scotland for twenty-one days[1].

[1] A curious custom existed on the borders of Scotland in former times known as 'handfasting.' Readers of Scott's romance, The Monastery, will remember the description of the custom given by the Baron of Avenel (chap. xxv): 'We bordermen are more wary than your inland clowns of Fife and Lothian—no jump in the dark for us—no clenching the fetters around our wrists till we know how they will wear with us—we take our wives, like our horses, upon trial. When we are handfasted, as we term it, we are man and wife for a year and a day, that space gone by, each may choose another mate, or at their pleasure may call the priest to marry them for life—and this we call "handfasting."' The custom arose partly from the want of priests. While the convents subsisted, monks were detached on regular circuits through the wilder districts to marry those who had lived in this species of connexion.

[2] The looseness of Scottish notions about marriage is in strong contrast to the ideas prevalent in England. In spite of the permission accorded by law to celebrate marriages in dissenting places of worship, a very large proportion of English dissenters prefer to be married by the clergy of the Anglican Church. The clergy, it is said, perform about seventy per cent. of English marriages. There is a suggestion of permanency about a marriage in the Established Church, which a marriage elsewhere lacks. It is an involuntary homage paid to the antiquity of an institution which has nearly twenty centuries of life behind it. It was so even when the Church of England was disestablished during the Commonwealth. Such a sturdy nonconformist as Oliver Cromwell was not free from this prejudice. Clarendon in his History of the Rebellion (bk. xv, par. 51), writing of the marriage of Cromwell's daughters, relates that though they were married first according to

In Scotland, the husband's adultery alone, without cruelty, entitles the wife to divorce. Wilful desertion, by either party, if obstinately persisted in for four years, is also a ground for divorce in Scotland. In the eye of Scotch law mutual guilt is no bar to a divorce. It entitles the parties to mutual divorces, the effect of which appears to be that neither party can claim any interest in the estate of the other. In granting divorce to parties who are mutually guilty, the Scotch law differs not only from the English law, but from the Canon law and the Roman law as well. If a respondent has been divorced for adultery with a co-respondent named in the decree of divorce, the respondent and co-respondent cannot subsequently marry. This rule of law is not confined to Scotland. According to the Scotch case of *Beattie* v. *Beattie* in 1866, it is or at any rate was the law of Lower Canada. It is well known that by Scotch law, as by the Roman law, the child is legitimated by the subsequent marriage of parents. In the reign of King Henry III an effort was made to import this excellent rule into the English law, but the barons of England refused. 'Nolumus leges Angliae mutari,' said they. Even in cases of bigamy, bona fides in one of the parents, though it does not render the marriage valid, seems to make the children legitimate. In Scotland a man can only dispose of a limited part of his moveable property by will. He cannot pass over his wife or children in the testamentary disposition of his moveable estate. The wife is entitled to her *jus relictae*, being one third or a half of the moveable estate, according as there are children or not, and the children are entitled to their *legitim* or 'bairn's part,' being one third or a half, according as there is a widow or not. A similar rule seems to have prevailed at one time in many parts of England. The shares of the wife and children were called their 'reasonable parts,' *rationabiles partes*. There is some doubt as to whether the rule was part of the common law or whether it was a custom peculiar to certain counties. Glanvil, Bracton, Fitzherbert, and Sir Henry Finch all speak of it as part of the common law of the land. Lord Coke, on the other hand, asserts that there must be a custom alleged in some county to enable the wife and children to the writ *de rationabili parte bonorum*, and that it had been so resolved by parliament. Lord Coke is probably correct. The custom continued in use in the province of York, the principality of Wales, and the city of London till modern times. By the statute 1 Vict. c. 26, however, it was enacted that

the rites and ceremonies then in use, they were afterwards privately married by Episcopal ministers according to the form of the Book of Common Prayer, and 'this with the privity of Cromwell, who *pretended* to yield to it in compliance with the importunity and folly of his daughters.'

every person should be at liberty to devise and bequeath all his real and personal property as he pleased.

In Scotland there is no division into felony and misdemeanour. Grand juries are unknown, except in cases of treason. It is the duty of the public prosecutor to see that there is a prima facie case against a prisoner. Coroners are also unknown in Scotland, but the procurator fiscal, who is a sort of local public prosecutor, makes an *ex parte* inquiry into any case of suspicious death. The right of private prosecution exists, but is seldom or never exercised. Every prisoner, however poor, is entitled by statute (Scots Statutes, 1587, c. 91) to have a counsel to defend him. If the prisoner has not previously applied for counsel, the Court will, as a matter of course, assign one to him, as soon as the diet is called. If no counsel are present, the sheriff of the county, who is always a counsel, and generally in active practice, and who must give his attendance at circuit, is named by the Court to defend. The jury numbers fifteen in criminal cases. A majority is sufficient to convict a prisoner. The jury may return three verdicts, 'guilty,' 'not guilty,' and 'not proven.' The verdict of 'not proven' does not, as many people seem to think, allow of the prisoner's being brought up for trial on the same charge a second time. After the verdict of 'not proven' is given, the matter becomes *res judicata*, and further proceedings on the same charge are barred.

J. A. LOVAT-FRASER.

THE INSTITUTE OF INTERNATIONAL LAW.

THE Institute of International Law was holding its fifteenth session when the last number of this REVIEW was appearing. As its next meeting is to be held at Cambridge, a short account of its origin and work may be welcome to those who are interested in the Law of Nations and the efforts made to bring states to a wider and more effective respect for the rules and proprieties of conduct which civilized nations are agreed in considering right.

The Institute came into existence in 1873. Dr. Lieber, the American publicist, M. Moynier, a distinguished Genevese, and M. Rolin-Jaequemyns, then a well-known Belgian advocate, afterwards Minister of the Interior at Brussels, and at present legal adviser to the King of Siam, conceived its formation immediately after 1870, at a time when the horrors of war were still vividly present to men's minds, and the desirability of fixing the humane principles which should govern it when inevitable, and of seeking in common the means of avoiding or settling disputes where possible without it, struck publicists in Europe and America as an object worth a great effort. M. Rolin-Jaequemyns, who had then just founded the Revue de Droit International, took the lead with singular energy. He communicated confidentially with twenty-two of the best-known publicists of Europe, and set forth his scheme of a 'conférence juridique internationale' in view of creating a 'corps permanent ou académie pour l'étude et le progrès du droit international.' The conference was held at Ghent, on September 8, 1873, and the Institute was the result. All precautions were taken in the rules framed for its government to preserve the international character of the body, and though the language adopted as that of the deliberations was French, the meetings of the Institute were to take place in different States of Europe. Its next meeting, in 1874, took place at Geneva. It has since met at the Hague, Zürich, Paris, Brussels (twice), Oxford, Turin, Munich, Heidelberg, Lausanne, and Hamburg. It has met twice at Geneva, Brussels, and Paris.

The idea of the founders of the Institute was not that by appeal-

ing to popular feelings about war and its terrors and horrors, an era of peace would result. As advocates and professors they knew and taught that there is a public law of Europeans, that there are rules which tend to prevail in intercourse between States, and which are observed though they have no sanction but the public opinion of the civilized world. This public opinion is of necessity mainly that of professors and writers in the field of international law. Incorporation of these professors and writers into a society composed exclusively of them, and the creation by their joint resolutions of a *corpus juris gentium* for the guidance of statesmen, seemed calculated to facilitate the development of the reign of right and law among nations.

The Institute has remained true to its purpose by admitting none within its circle but those who, by their science or experience, can forward its object. Its mode of operation is to study all questions during the intervals between the meetings in permanent commissions, among which the whole domain of international law is divided up. The commissions, under the direction of their *rapporteurs* or conveners, prepare reports and proposals, which are printed and distributed among the members some time before the plenary sittings at which they are to be discussed. Many questions, like those of extradition, prize law, territorial waters, have been thus under consideration for many years. By this constancy and sequence in the work of the Institute its resolutions have the authority attaching to a mature expression of the views of the leading international jurists of Europe.

On the other hand, the Institute, through the writings and teaching of its members, reaches the younger generations, who listen with respectful ear at the universities and law-schools to the distinguished men who explain to them the rights and duties of States.

The Institute is thus in a twofold way unobtrusively rendering service to mankind. Indeed, its very influence is in some sense proportioned to its sincere indifference to publicity.

The maximum number of members is fixed at 120, divided into two classes—those who 'have rendered services to international law in the domain of theory or practice,' denominated members, and those 'whose knowledge may be useful to the Institute,' called associates. There is no distinction, however, between members and associates except that the latter have no part in the government of the corporation. Moreover, as it has become customary (since 1878) to elect candidates first as associates only, the *status* of associate is practically without distinction as to the scientific value of the two classes.

To preserve the international character of the Institute, the articles provide that no country shall possess more than one-fifth of the total number of members and associates combined. At the present moment the total number is 113, of whom 56 are members and 57 associates.

The following table, compiled from M. Lehr's *Tableau général* of the work done by the Institute, shows the proportionate composition of the body by nationality :—

Germany	19	Holland	3
France	18	Argentine Republic	2
Great Britain	13	Denmark	2
Italy	11	Portugal	2
Belgium	8	Turkey	1
Switzerland	7	Venezuela	1
Russia	6	Costa Rica	1
Spain	5	Japan	1
Austria-Hungary	5		
Sweden and Norway	5		113
United States	3		

The large number of law-schools and professorships of international law in Germany and France explains the greater proportion of seats held by these two countries.

The labours of each year are chronicled in an admirably printed *annuaire*, which is to be had through the booksellers. In it are published the final memoirs of the commissions and the essential parts of the discussions at the plenary sittings on the propositions submitted by the commissions. These form, with the volume which has just appeared recording the past year's work, a series of twelve volumes. The present general secretary, M. Lehr, in the *Tableau général* above mentioned, has had the happy thought of selecting and publishing in a separate volume all the resolutions adopted from 1873 to 1892. He has accompanied each part by a succinct *historique*, and the whole, with its etched portraits of the past presidents, forms not only a pretty volume but a valuable compendium of the results of revision, by the men of authority on the subject, of the existing law of nations.

This *tableau* shows that the Institute, though they have by no means dealt with the whole area of international law, and have plenty of work still to do, have well employed the twenty years of their corporate life.

The record is appropriately headed by a project for the publication and centralizing of international treaties and arrangements. The Swiss Government has taken the matter up, and it is believed that an international union similar to that for the joint publication of customs tariffs will issue from the negotiations.

The Institute, however, has gone further than this in endeavouring

to bring about a collection together of all the laws of the world in a central library accessible to everybody. Excellent work in this respect has been done by the Foreign Laws Committee of the French Ministry of Justice. The library of foreign laws in the Place Vendôme is certainly far from complete, but, considering the smallness of the funds the French Parliament allows for the purpose, the Committee does wonders in increasing its well-organized collection.

In maritime law collisions at sea were for some years the subject of long and careful discussion, which resulted in the adoption in 1888 of a code and regulations which, though it cannot be considered as an expression of the views of the English members, embodies the views of a considerable majority of the continental writers.

The treatment of private property at sea during maritime war, prize-court procedure and a code of prize law, over which the Institute spent five or six years, pacific blockade, and, lastly, the rules which have just been adopted in Paris on territorial waters, form the rest of the work done in maritime law.

The navigation of international rivers, the position of the Suez Canal, the protection of submarine cables (an international convention followed the discussion and resolutions on this question), form another group of subjects.

The code of the laws and customs of war drawn up by the Institute has become the text on the subject on the continent of Europe.

Extradition has been on the orders of the day since 1877, and is still under examination, the basis being, however, the now famous Oxford articles adopted at the Oxford meeting in 1880.

Occupation of territory, arbitral procedure, the exclusion and expulsion of foreigners, the position of foreigners and foreign sovereigns in the Law Courts, conflicts of law in maritime assurance, company's law, bills of exchange, bankruptcy, capacity, marriage, divorce and guardianship, complete the list of the work done to date.

Fifteen commissions are at present at work on questions of guardianship, copyright, the position of vessels and their crews in foreign ports, the use of the national flag, the position abroad of foreign corporations, the penal sanctions which can be given to the Geneva Convention, the regulation of international transport, contraband of war, compensation to foreigners for damage sustained by them through civil war, rioting, &c., nationality, naturalization and expatriation, international measures in relation to stolen securities, judicial arrangements as regards European litigants in the East, diplomatic and consular immunities, and the registra-

tion of births, deaths, and marriages by consuls and diplomatic agents.

Only three or four of these commissions will be in a position to advance work at Cambridge, where the chief subjects of discussion will probably be contraband of war and nationality. The commission on the former subject, under the convenership of M. Kleen (most of whose books on international law unfortunately are only read by those who are masters of the Swedish language), have printed quite a literature preparatory to the discussion[1]. The nationality question, at a time when the continent seems to be drifting into subordinating everything to the increase of the soldiery, and France in particular, panic-stricken at her own small procreative power, is increasing her population by turning foreign residents into Frenchmen in spite of themselves, is marked out as one of the most important of the day.

The meeting last spring in Paris signalized itself by the adoption of a code on territorial waters, a subject of particular interest in this country owing to the recommendation of the recently issued report of the Select Committee on Sea Fisheries (1893); and another on bankruptcy, which is about to form the subject of an official international conference at the Hague.

The unscientific nature of our legal studies preparatory to a professional career places the work of the Institute beyond the beat of most English lawyers[2]. This is to be regretted, but is hardly to be helped till we increase the scope of legal education in England. There is, moreover, a tendency among English lawyers to look with the same distrust upon theory in law as other Englishmen do upon theory of all kinds, especially when emanating from a body whose titles to speak are not laid out before them for examination.

In this respect no corporation is more exacting than the Institute itself, which, prior to admitting any one into its midst, privately submits a printed biography and list of the publications of the candidate for the consideration of the members, and only such as a majority consider fit to help on the work of consolidation and reform in international law are received.

It is certain that when once the Institute and its labours and objects are familiar to Englishmen, it will find no heartier welcome

[1] One of these, published by Pedone-Lauriel in Paris, is a volume by M. Kleen, entitled *De la Contrebande de guerre et de transports interdits aux neutres d'après les principes du droit international contemporain.* 1893.

[2] The English members are as follow :—Sir Travers Twiss, Q.C., and Sir R. Hart, G.C.M.G., hon. members; Professors Westlake, Holland, and Dicey, Lord Reay, Mr Hall, and the writer, members; and Mr. Justice Scott, Sir Sherston Baker, Sir D. Mackenzie Wallace, Professor Leech, and Mr. T. J. Lawrence, associates.

than in this country, where it is true the humanitarian character of a movement is often mixed up with considerations of personal aggrandizement, but where sincerity, intrinsic merit, independence, and modesty never fail to meet with an appreciation all the greater because these virtues are seldom found together.

THOMAS BARCLAY.

REVIEWS AND NOTICES.

[Short notices do not necessarily exclude fuller review hereafter.]

Les Origines du Droit International. Par ERNEST NYS. Bruxelles: A. Castaigne. Paris: Thorin et Fils. 1894. 8vo. 414 pp.

IN this important and interesting volume we have not so much a history of International Law during the earlier centuries of its development, as a series of essays upon its leading characteristics during that period. The plan of the work is, in fact, not dissimilar to that of Mr. Ward's *Enquiry into the foundation and history of the Law of Nations in Europe, from the time of the Greeks and Romans to the age of Grotius,* published in 1795. But many sources of information which a century ago were inaccessible are now open to the student of such matters. Chronicles have been carefully edited, long-lost charters and secret memoirs have been brought to light, State papers have been catalogued, vast miscellaneous collections of MSS. have been indexed, and elaborate monographs have appeared upon almost every topic of International Law. M. Nys, in ability at least the equal of his predecessor, has made the fullest use of his improved opportunities, and has found time for researches which have resulted in not a few curious biographical and bibliographical discoveries, as also in the correction of various erroneous statements which have too long been handed on from one text-writer to another. M. Nys deals successively with the mediaeval conception of the science, the Papacy and the Empire, war and Christianity, steps short of war, private war, causes of war, war against infidels, balance of power, the lawfulness of war, declaration, conduct of warfare, Peace, Commerce, Diplomacy, Discovery, Mare Liberum, 'Les Irénistes.' Some of these topics have been treated of previously by the same author, in one or other of the numerous works upon the Law of Nations published by him during the last fifteen years, such as *La guerre maritime, Le Droit de la guerre et les précurseurs de Grotius, L'Arbre des batailles d'Honoré Bonet, Les Commencements de la Diplomatie jusqu'à Grotius*[1]; but the materials thus accumulated have been thoroughly re-tested and re-polished before being used for the purposes of the new book, which is a storehouse of first-hand information, and indispensable to any good legal or historical library.

It is of course possible to differ from the author here and there upon questions of detail, though the wise critic will be chary of doing so. It is, for instance, hardly fair to Richard Zouch to say that he borrowed, without acknowledgement, the term 'ius inter gentes' from Vittoria. This term (whence Bentham's 'International Law') was deliberately coined by Zouch as a name for the new science, though the words composing it enter incidentally into a sentence written by Vittoria, as also indeed into sentences written by Suarez, Selden, and Grotius. M. Nys does ample justice to the admirable statement by Suarez of the true nature of International Law, but he omits to mention the earlier and equally lucid account of the matter given by Richard Hooker. He has plenty of continental authority for holding that International Law is a 'droit véritable,' but the authorities on the other side are surely too respectable to be dismissed with the remark

[1] LAW QUARTERLY REVIEW, Vol. I, p. 102.

that 'la question ne doit plus être discutée de nos jours.' One may be disposed to doubt whether the chapter entitled 'le commerce' might not, for any bearing which it has on the main subject of the book, have been better omitted. But these defects, if such they be, are trifles compared with the solid contribution to knowledge for which we are indebted to M. Nys. His chapter on 'les causes de la guerre' may be especially cited as abounding in interest and in recondite learning. Few, even among specialists, will not meet there with writers of whom they had not heard before, but who are well worth hearing about. The early English military ordinances may, it is true, be found elsewhere; but the Mussulman rules of warfare are by no means well known, nor is the 'Sempacherbrief' a familiar document.

The seventh chapter contains an interesting account of the views of Wyclif on the rights of heretics and infidels. Elsewhere the merits of the Civilians, as advisers of Elizabeth and James I upon international questions, receive their due meed of recognition, and the College of Advocates of Doctors Commons is mentioned with the respect which it well merited. But though M. Nys must have spent many an hour upon little consulted MSS. in the British Museum and the Record Office, as well as in similar depositories on the continent, he is no mere bookworm or antiquary, but has a firm grasp of the principles of his subject and a wide outlook over its history.

T. E. H.

An Introduction to the Study of Anglo-Muhammadan Law. By Sir ROLAND KNYVET WILSON, Bart. London: W. Thacker & Co.; Calcutta: Thacker, Spink & Co.; Bombay: Thacker & Co., Lim. 1894. 8vo. vi and 151 pp. (*7s. 6d.*)

THIS work of about 150 pages is published merely as an introduction to a larger work on 'Anglo-Muhammadan Law' (in other words, on Muhammadan Law as administered by the Anglo-Indian Courts), and it must not, therefore, be expected to contain the same elements of instruction as if it were distinctly a legal treatise. Still, when an author offers to the public a 'brief outline' of an important branch of Jurisprudence, as the late Cambridge Reader does in his final chapter, he invites legal criticism of that part of his work. Sir R. K. Wilson has been a teacher of Muhammadan Law for many years, and we should have expected him to have avoided certain misleading statements which, it may be hoped, are only made through haste, and will not be reproduced in his forthcoming larger book. He tells us that where 'there is a daughter and no son, or a sister and no brother, the female takes half (or two or more together, two-thirds) of whatever is not otherwise disposed of, leaving the rest for the remoter male heirs, whoever they may happen to be;' but he probably knows very well that the statement should be confined to males related through males, for those related through females (except, under some circumstances, uterine brothers), would take nothing, and the daughter or sister (or daughters or sisters) would take the rest of the property by the 'return.' A subsequent statement that 'the rule of the "double share to the male" is also applied between the parents, where the case is such (there being no children) that they will inherit together,' abounds in error, for if there be a son's son or son's son's son (and no children) the father and mother will each take a sixth, and if there be two or more brothers or sisters (and no children or son's sons, &c.), they will 'drive the mother from a third to a sixth[1],'

[1] The quotation is from Sir William Jones's translation of Al Sirájiyyah, p. 14 in the original edition.

while the father will exclude them and will take the whole of the other five-sixths. The supposition (in the same sentence) that a mother may have been saved from having one-twelfth by an apprehension that it would make the division 'too complicated,' will excite the risible muscles of those who know what mighty fortresses of numbers are fearlessly assaulted by the arithmetical champions of Islam! The historical and quasi-historical portion of the little treatise is founded almost entirely on the works of other modern writers, and cannot therefore serve as an authority for the student, though it may have some interest for the *dilettante* Muhammadan lawyer. Sir William Muir serves as a reference for many of the statements, and it is touching to learn, on his authority, that the widow and daughters of a deceased Muhammadan owe their provision under the law of inheritance to the fact of the Prophet's having partaken of a lordly supper with a feast of fresh dates as a finish. Such is the simplicity of a primitive age! Can any one tell how many good dinners and how many bottles of champagne would be required to soften the heart of a modern legislator?

The Law of Trademarks, Tradename and Merchandise Marks, with chapters on Trade Secret and Tradè Libel, and Statutes. By D. M. Kerly. London: Sweet & Maxwell. 1894. 8vo. xlviii and 752 pp. (25*s.*)

Mr. Kerly's book is compact and exceedingly well printed. The fact that down to 1892 as many as 70,625 trade marks had been registered, and that the average addition per year is considerably over 5000, shows the importance of the subject-matter with which the book deals. The special points in the Act of 1883 are taken in order in successive chapters, with sections for each particular set of operative words, such as 'device,' 'brand,' 'ticket,' 'label,' 'fancy word,' 'passing off,' &c. There is a very full chapter on 'What marks may be registered as trade marks,' and the discussion of 'invented words' is valuable. Practitioners who are consulted as to registering Welsh words or Gaelic words in relation to flannel or whisky, will find the perils of utilizing such words clearly set out, in accordance with the decision in the Somatose case, when it was held that a fancy word, formed of the Greek σῶμα (body) and the ordinary affix 'ose,' was a 'descriptive' word, and consequently not permissible as a trade mark for a chemical food that claimed to be 'easily absorbed into the body.' If there is a little haziness in some of the paragraphs, it must be confessed that the anomalies in some of the judicial distinctions also involve some confusion. It is perhaps too much to hope for a set of consistent precedents, when questions come before Chancery and Common Law judges from so many differing points of view. The consequences of the decision in *Moet* v. *Pickering* are not very clearly expressed (358 pp.) in the words, 'The lien of a wharfinger for his charges in regard to goods deposited with him, including the costs he is put to by being made a defendant in a trade mark action, is not destroyed if the goods turn out to be spuriously marked, and although in some earlier cases the plaintiff was adjudged to have a lien upon the goods, subject to that of any wharfinger, or mortgagee, who had an earlier charge, and who was innocent in regard to the infringement, the Court of Appeal in the last case cited expressed considerable doubt whether such a lien could be supported.' It would be difficult for a reader to gather from this involved sentence that Fry J. had given costs to a plaintiff against the infringing defendant and a co-defendant who was wharfinger, postponing the lien of the wharfinger on the goods in store, until the plaintiff

recovered costs. The Appeal Court decided that '*the wharfingers were entitled to a prior lien*' to the plaintiff, and as the wharfingers had, in their plea, submitted to the direction of the Court, that they ought not to be saddled with costs. Six short sentences would have been more succinct than the long one. The author has been very diligent in the compendium of cases. The Leicester case, under the Merchandise Marks Act, in reference to the hosiery custom of calling certain goods 'natural wool' when they were made of 'little wool' and much cotton, is given from the daily newspaper report. The case of *Budd* v. *Lucas*, in which the Divisional Court held that in the sale of a cask of beer, 'barrel' is a trade description, is quoted to illustrate five or six different points. This indicates a careful examination of cases, though, by the bye, no comment is made on the fact that the Weights and Measures Act declares all contracts void, if measures of capacity not allowed in the Act are used. But this decision requires that, if used as a *trade description*, the disallowed measure must contain its full thirty-six gallons, thus reviving a discontinued measure of capacity. Some decisions only a few weeks old are fully noted. It may be that the author does not show the exactness and precision requisite for the analysis of intricate particulars—everyone cannot emulate the late Lord Justice Cotton—yet, on the other hand, he is well qualified in the arts of skilful generalization and accurate ingathering of data. A better book to 'start the train' in working trade mark cases could hardly be desired.

The Statutes of Practical Utility. Being the Fifth Edition of 'Chitty's Statutes.' By J. M. Lely. Volume I, 'Act of Parliament' to 'Charities.' London: Sweet & Maxwell, Lim.; Stevens & Sons, Lim. La. 8vo.

It is our custom to note at the head of a review the number of pages in the book before us. To do this with the new edition of 'Chitty's Statutes' would be an arithmetical exercise, inasmuch as the paging is no longer continuous through each volume, but is now separate through each title. This is an improvement. For to have continuous paging throughout such a book of reference as 'Chitty' serves no useful purpose except that of collation. To have each title paged is useful, especially as we understand that each title may be procured separately. The volume of 'Chitty's Statutes' increases by leaps and bounds. It duplicates itself like the nails in a horse's shoes. It began in the year 1828 in two stout volumes. The second edition was not published in its entirety until 1854, and the third came out in 1865. For the fourth in 1880 Mr. Lely was responsible. That was in six volumes. Now, nearly fifteen years later, comes the fifth edition, which is to be in no less than twelve volumes. In effect, the size of the work is nearly doubled in fifteen years. But such are the energy and the industry of the editor, whose pen has covered a larger surface in the legal field than any other, that he promises his final volume by April or May, 1895. If he fulfils this promise, he will do well indeed. He will have built another monument of learned and laborious industry. And the name of Lely will be almost as well known to future generations of lawyers as is the name of Chitty. What adds very much to the labours of Mr. Lely and his confrères is that it is sometimes necessary for them to retain repeated enactments and parts of enactments for the due understanding of the existing law. The great value of their work is in the cross references. We do not value nearly so highly the notes which refer to some of the decisions upon the Acts. In this, the first volume, we are glad to note

one great improvement upon the fourth edition, which is the new title 'Bastardy.' The Acts upon this subject have hitherto been to be found under 'Poor' only. To conclude, Mr. Lely's work is as painstaking and thorough as he has accustomed lawyers to expect at his hands.

Mayne's Treatise on Damages. Fifth Edition. By JOHN D. MAYNE and LUMLEY SMITH, Q.C., Judge of the Westminster County Court. London: Stevens & Haynes. 1894. 8vo. xliii and 642 pp.

IN the preface to the original edition of this standard work, published as long ago as 1856, the author observed that the number of cases in which the rules for ascertaining the measure of damages were also the only rules for ascertaining the existence of a right of action, and of cases in which no measure of damages could be stated at all, had 'made many parts of the present work resemble a treatise on the law of Nisi Prius rather than one exclusively appropriated to Damages.' There was much substance in this reflection, and it is because 'Mayne on Damages' is really as complete and useful a treatise on Nisi Prius as one volume of its size will contain, that after nearly forty years of existence it is now taking a new lease of life. In reality it treats of the whole law of Nisi Prius from the point of view of damages, and it would not be an easy task to write anything deserving to be called a book on Damages in any other way. There are many law-books: a certain proportion of them are good: and the general practitioner takes to some two or three of the good ones, not necessarily because they are the very best, but because he knows his way about them. One lawyer of great learning always turns in the first place, when brought up by the arising of a new point of law, to 'Williams on Executors.' Others have other favourites, and from the appearance of the present edition we might infer, if we did not know, that there are many men to whom Mr. Mayne's book is one of the necessary companions of their professional lives. From the fact that the present editors are the author and Judge Lumley Smith, we may further infer that to such persons the fifth edition will not be less useful than its predecessors. A study of the footnotes will reveal the fact that the activity of the Court of Appeal during the ten years that have elapsed since the publication of the fourth edition has effected a somewhat smaller proportion of substitution of new for old authorities than a constant reader of the Reports might have been tempted to expect. We are glad of it, for it shows that practically, in the opinion of two particularly learned and industrious commentators, the main principles of English law tend continually to undergo illustration rather than renovation, which is quite as it should be.

Company Law and Practice with Forms and Precedents. By T. C. H. CHADWYCK HEALEY, Q.C., PERCY F. WHEELER, and CHARLES BURNEY. Third Edition. London: Sweet & Maxwell. 1894. Imp. 8vo. cxxiii and 1246 pp. (£2.)

THIS book is itself an admirable example of the co-operative principle of which it treats. In former editions it is well known to the profession and much appreciated, but the present edition will immensely enhance its reputation. *Μέγα βιβλίον μέγα κακόν* is for once not true. The method adopted is not that of Mr. Buckley, of annotating the Acts, nor of Mr. Palmer, of grouping the law around forms, nor of Mr. Manson, of an alphabetical digest. In what may be termed Part I we have a masterly

and exhaustive treatise on the general principles of Company Law, and none but those who, like the present writer, have tested the matter page by page and line by line, can adequately appreciate the vast labour which has been condensed into these first two hundred pages. Every sentence is the distilled essence of many authorities carefully weighed, sifted, and analyzed in the light of a not merely theoretical but thoroughly practical acquaintance with the subject. On one point, however—and we only allude to it because it is in these days a very important one—we feel constrained to question Mr. Chadwyck Healey's view, and that is the doubt he expresses as to the validity of debentures to bearer (p. 174) on the ground that there is no second contracting party within Lord Cottenham's ruling in *Squire* v. *Whitton*. 'Is the word "bearer,"' he asks, 'any sufficient description of a second contracting party? . . . The description of the parties to a contract should be such that their identity cannot fairly be disputed, and such description, it may be said, is not sufficiently supplied by the word "bearer" any more than it is in the case of a contract to sell land by the word "vendor."' We venture to think that the promise is to pay to any one who satisfies the character of 'bearer'—a springing or shifting contract similar to that of an advertised reward and condition fulfilled, and that the maxim 'Certum est quod certum reddi potest' applies. No doubt there might be troublesome points about consideration; and if the instrument is under seal, further difficulties arise. It would hardly do to say that the trouble of presenting the debenture for payment is the consideration.

The second part—more than half the book—is devoted to the now voluminous subject of Winding-up, and here we have the subject very conveniently grouped—case law, statute law, rules, orders, and forms all together—under leading headings, 'Committee of Inspection,' 'Proof of Debts,' and so on. We have dwelt on the law, but the forms and precedents are quite as striking a feature of the book. They are abundant and excellent, and evidently the ripe fruit of much experience. All the most recent cases are noted, and the indexes leave nothing to be desired. Taken all together, this is, in our opinion, the most complete and useful work yet issued on Company Law and Practice, and we shall be much surprised if it does not assume the leading position among books dealing with that subject.

Outlines of the Law of Torts. By RICHARD RINGWOOD. Second Edition. London: Stevens & Haynes. 1894. 8vo. xli and 253 pp. (10*s.* 6*d.*)

THE number of works on the subject of Torts, from the voluminous treatise down to the most elemental text-book, is very considerable. But that there is a demand for a clear and well-written work dealing with the Law of Torts concisely, yet comprehensively, is evidenced by the fact that Mr. Ringwood's book has reached a second edition. The author informed us in the preface to the first edition that certain lectures delivered by him before the students at the Law Institution formed the groundwork of the volume, and the clearness and symmetry of its arrangement bear evident traces of its origin. Since its first appearance in 1887 the question of Employers' Liability has been much discussed, but so far without any tangible result in statute form. The law, therefore, on this subject is still governed by the Act of 1880, which has been renewed from year to year from the date of its expiration in 1887, and most of the cases in which

points of difficulty under the Act have been judicially determined are referred to in the present work. The chapter on malicious injuries is new, and dealing as it does with many questions of great interest and importance, particularly at the present time, such as malicious inducements to a breach of contract or malicious injuries to a person's property or trade, is of especial value. A full account is given of the recent leading case in this branch of the Law of Torts, that of the *Mogul Steamship Co.* v. *McGregor Gow & Co.*, 23 Q. B. D. 598 and '92, A. C. 25. The short chapter on torts in respect of domestic relations is also new, and includes the law respecting seduction, which is perhaps too summarily dealt with. More also might have been said about the remedy by injunction and as to various breaches of duty on the part of public officers remediable by the prerogative writ of mandamus. The author, however, modestly professes to deal only with the outlines of torts, and the title is a very apposite one, for the sketch here given can be filled in by the student from such a storehouse of authorities as 'Addison on Torts,' while the numerous references to judicial decisions enables the practitioner, if necessary, to follow out into wider tracks the indications given in the text. There is a good table of cases, and a list of statutes referred to finds a place in the fairly full index. The work is an excellent one in most respects, and as a useful summary of the Law of Torts compares favourably with similar works, whether for students or practitioners.

The Law of Patents: with Acts, Rules, Forms and Precedents. By HENRY CUNYNGHAME. London: William Clowes & Sons, Lim. 1894. Demy 8vo. lxxiv and 635 pp. (25*s.*)

THE size of the average work on Patent Law shows clearly the difficulty of compressing within the limits of a moderate-sized volume a complete account of the subject of this book. Although the Law of Patents now depends chiefly on the Act of 1883, with a few short amending Acts, there are an immense number of judicial decisions, both of an earlier and a later date, which must be considered by any one who attempts to apply the Act to a particular case. A work on Patent Law must necessarily to a great extent consist of a digest of these cases, and much of its value depends on the clearness with which the facts in each case are stated. This condition is abundantly fulfilled by the work before us. The Table of Cases is practically complete, and the indication it contains of the subject-matter of most cases is a novelty which will commend itself to all. For some reason the Law Report references of many cases referred to, which are in the L. R. series, are omitted both in the Table of Cases and in the body of the book; this is to be regretted, as the fact of their being in the Law Reports would mark them out as likely to have some point of greater value than the ordinary R. P. C. cases. Few will be likely to differ from the opinion expressed by the author at the close of the Introduction that Patent agents, whose duties so much resemble those of solicitors, should have something corresponding to the solicitor's lien and the professional privileges as to their clients' secrets. Less attention than we should naturally have expected is bestowed on the somewhat important subjects of mortgages and licences, especially the former, and the consideration of the position and rights of the mortgagee and the licensee. The Patent Act of 1883, with the alterations due to subsequent amending Acts embodied in it, the Patent Rules of 1880 and 1892, the Law Officers' Rules, Official Forms, and the Patent Office Circular printed in extenso in the appendix, with forty-five pages devoted to a collection of common forms, make a useful addition to

the main body of the work. The author must be complimented on having succeeded in compressing a vast mass of case law into a volume of a very reasonable size without sacrificing clearness to brevity: he has put a practically complete account of English Patent Law into a handy form which will commend itself to professional men, for whom it was primarily written, while it will probably be acceptable to others, and will be of great assistance to many an intending patentee.

Key and Elphinstone's 'Precedents in Conveyancing.' Fourth Edition. By THOMAS KEY and C. HERBERT BROWN, with assistance, which is acknowledged in the Preface, from Sir H. W. ELPHINSTONE and E. P. WOLSTENHOLME. Two Vols. London: Sweet & Maxwell, Lim. 8vo. lxxx and 1051, lxxx and 1078 pp. (4*l.* 4*s.*)

THIS edition brings up to date a work which is universally acknowledged to be one of the best of its kind, and one of first-rate usefulness to students and lawyers alike. The forms have always been distinguished for their style and practical utility, and are especially useful in the case of mortgages of building leases and public house property. The forms of and relating to conditions of sale are especially useful and comprehensive, and, in particular, we may mention the special conditions relating to building land. The book contains also, in addition to the more ordinary forms, useful precedents in connexion with patents, notices, and trading agreements and some serviceable miscellaneous forms, which, so far as we have been able to discover, are not contained in any other collection of precedents. The feature, however, of the new edition consists not so much of additions to the precedents as of the new matter introduced into the notes, many of which have been either wholly or in part re-written, so as to bring them well up to date, and are a mine of valuable information on conveyancing law. There are references throughout to the latest Acts and cases, and especial attention is directed to the Addenda and Corrigenda, which contain additional and substitutional references to many of the most recent decisions of 1894 and to the Acts of 1893 (passed after the book was partially printed), and, in particular, to the Trustee Act, the Married Women's Property Act, and the Conveyancing Act of that year. The preliminary notes to each group of precedents are useful and exhaustive, and good examples of the general notes, showing their practical nature and comprehensiveness, are contained in vol. 2 on pp. 23 and 54, on 'powers of sale,' and 'attornment clauses' in mortgages. The editors might, perhaps, have stated with advantage in the notes on insurance and repairing covenants in mortgages, in what cases it is advisable to insert such covenants in mortgage deeds. The vast amount of work that has evidently been expended on these notes has produced a most valuable and useful result, and should go far to procure for the book an even higher position than that to which it had previously attained.

A new edition (the fourth) has also been brought out of Elphinstone's 'Introduction to Conveyancing,' edited by Sir H. W. Elphinstone and James W. Clark (London: Sweet & Maxwell, Lim., 1894, 8vo, xxxii and 551 pp. 14*s.*). This work is well known to the public, and needs no recommendation. It is intended for students who have first acquired an elementary knowledge of real property law, and can very usefully and in a very practical manner be studied in connexion with the precedents above mentioned, to which there are references throughout. The object of the book is to offer

a gradual course of instruction, and a preliminary note indicates what parts may be left out on the first perusal. The book has been brought well up to date. There are references to the latest decisions, and it is adapted as far as possible to the scheme of lectures at present attended by students for the Bar examination.

Ruling Cases: arranged, annotated, and edited by ROBERT CAMPBELL. With American Notes, by IRVING BROWNE. Vol. I. Abandonment—Action. London: Stevens & Sons, Lim. Boston, Mass.: The Boston Book Co. La. 8vo. xxix and 829 pp. (25*s.* net.)

THE object of this handsome volume, which is the first of what will no doubt be a long series, is, according to the Preface, to supply the practitioner with English Case Law in a handy form. The Ruling Cases are to inform him as to the principles, and the Notes to show in detail how the principles have been applied or modified. American notes are appended to each of the English Ruling Cases, and notes thereon, and the object of these American notes is to point out concisely the agreement or disagreement of the American case law with the English, and generally to commend the work to the American as well as the English practitioner. The objects of the series, it will be seen, are very extensive. The English Ruling Cases seem generally to have been well and carefully chosen, and a great amount of work has been expended. The series will no doubt be of great service to men without large libraries; nevertheless, we are of opinion that so much has been aimed at as to make the result fall short of completeness in execution, and to impair to some extent its practical utility. In the English 'Ruling Cases' the judgments are sometimes incompletely set out for the purpose of saving space. There can be no doubt that space is gained by leaving out such passages as the editors deem unnecessary; but, where the whole object is to establish the grounds on which the judges have settled the law, this method is in our opinion wrong, and tends to produce incomplete and unscholarly results. *Lumley* v. *Gye*, for example, is ruthlessly cut down, and Sir John Coleridge's dissenting judgment omitted, so that the history of the law is quite obscured. The notes, which are intended, as before stated, to show the practical application of the leading principles, do not seem to us to be, as a rule, sufficiently detailed and thorough. To compare the results of the work in this volume with similar results in Smith's Leading Cases or White and Tudor's Leading Cases is, to our minds, the best proof of this; and the main objects of the present volume are the same as those of the older works. Again, the present work is stated to be on the lines of Saunders' Reports (or rather Williams on Saunders), and again we can only say that a comparison between the two, as regards the completeness of working out in detail the application of the principles, is distinctly unfavourable to the 'Ruling Cases.' Great accuracy and care are shown in the preparation of the notes, so far as they go, but we do not understand on what system or for what object the case of *Leake* v. *Robinson*, which is really a decision on the rule of equity, independent of statutes, against perpetuities, comes to be cited on p. 518 among the notes under the heading of 'Accumulation.'

Moreover the English Ruling Cases include cases and notes on the practice of the English Courts, and as this can only be intended for purposes of practical utility, we must again doubt whether the desired result has been attained. Leading principles, such as there are, on questions of practice can be usefully dwelt upon only in respect of their application, which varies

so much according to the different circumstances of each case in which they are applied as almost to do away with the idea of any fixed leading principles. Taking, for instance, the heading of 'Abatement,' it is certainly difficult to see how, with the mere references to changes made by the Judicature Acts, and nothing more, the notes can be of much assistance in actual practice. Moreover, from an English point of view we fail to see the usefulness of reviving old terms now obsolete (see the note on p. 156 as to this). We should be disposed to doubt whether English practice cases and notes could be of extensive utility in a work intended for the American as well as the English market. Of this, however, we must presume the American editor to be the best judge. With regard to the American notes, we do not see, if the principles of the American decisions are to be properly understood and made use of to any extent in England, why the most important of such decisions have not been admitted on the same footing as the English ones. The American notes, as they stand, appear to us not likely to help English practitioners except for the purpose of multiplying references which English Courts will probably discourage. For the American practitioner they would seem (though here again we cannot confidently put our judgment against the American editor's) not to be full enough. The extremely important decision of the Supreme Court of the U. S. in the *Nitro-glycerine* case is dismissed in a line and a half. Under the same head, 'Accident,' we find no reference to the recent and not unimportant English case of *Stanley* v. *Powell*. As regards externals, the book is got up in a very handsome manner, and there is a useful and well-arranged index of both English and American cases cited.

To sum up, the actual work in this volume seems to us most deserving of success so far as it goes, but we think that it fails to attain to a first-rate level of merit through aiming at too many kinds of merit at once. Full practical notes on the scale of Smith's Leading Cases or Williams's Saunders are one thing, and the exposition of principles to be found in a good text-book, or better still in the occasional great judgments which review the principles of a subject, is another thing. Practical notes for an English lawyer, again, are one thing, and practical notes for an American lawyer are another thing. The qualities required for excellence in these several kinds of work are obviously not the same, and it is not obvious that they are compatible in the same book. Experience will show whether the editors of 'Ruling Cases' have achieved the task of combining them. We will not say offhand that they have not; but we are not prepared to say, in anticipation of experience, that they have.

We have also received:—

Notes on Land Transfer in various countries. By C. FORTESCUE-BRICKDALE. London: Horace Cox. 8vo. iv and 66 pp. (1*s.*)—This pamphlet contains a store of facts which should be consulted and weighed by every one interested in the problem of simplifying the transfer of land. One of the most important points is that in the Australian colonies titles were by no means short and simple before the Torrens system was introduced, although one of the stock arguments used at home against registration of titles is that it may do very well for a new country but would not work in an old one. We may add that the system has been at work for several years in Trinidad, where English real property law had been superposed on old Spanish titles. No trouble has arisen from it save that (under extremely peculiar conditions now best forgotten) claims for registration were to some

extent used as an irregular substitute for actions of ejectment to determine questions in dispute, or sometimes, it was said, for purposes of mere delay and embarrassment. Such abuses can easily be prevented if administrative and judicial officers do their duty. In the United States it seems probable that Massachusetts will adopt the system before long. If it succeeds in one or two States, the others are pretty sure to follow.

The Law and Lawyers of Pickwick. A Lecture. By FRANK LOCKWOOD. London: The Roxburghe Press. 12mo. 108 pp. (Cloth 1*s.* 6*d.*, Manilla 1*s.*, net.)—This is a mighty pleasant legal diversion. *Bardell* v. *Pickwick* is one of the best known leading cases of English fiction, and Mr. Lockwood is its best possible annotator. Note, learned reader, Mr. Lockwood's reasons for thinking that Mr. Pickwick would have fared even worse under the modern law of evidence, when Serjeant Buzfuz would have had the materials for a crushing cross-examination. The Roxburghe Press particularly wants to know how people like the title-page printed in green ink. To be frank, we love a judicious mixture of red and black after the sixteenth or seventeenth-century manner, but green does not captivate us.

A set of Test Questions on various text-books, embracing all the subjects at the Solicitors' Final Examination. By JOHN INDERMAUR and CHARLES THWAITES. London: Geo. Barber. 1894. 8vo. 143 pp.

An Index of all reported cases decided in the English Courts during the period covered by the Revised Reports. Vols. 1–15. (1785–1816.) London: Sweet & Maxwell, Lim. Boston: Little, Brown & Co. 1894. La. 8vo. xiv and 313 pp.

The Opinions of Grotius. By D. P. DE BRUYN. London: Stevens & Haynes. 1894. 8vo. xlviii and 668 pp.

Inebriety or Narcomania. By NORMAN KERR. Third Edition. London: H. K. Lewis, 136 Gower Street. 1890. 8vo. xxxix and 780 pp. (21*s.*)

A Practical Treatise on the Criminal Law of Scotland. By J. H. A. MACDONALD. Third Edition. By the Author and N. D. MACDONALD. Edinburgh: W. Green & Sons. 1894. 8vo. xv and 652 pp. (31*s.* 6*d.*)

Banking Law, with Forms. By WILLIAM WALLACE and ALLAN MCNEIL. Edinburgh: W. Green & Sons. 1894. 8vo. xxxii and 433 pp.

A Manual of the Study of Documents to establish the individual Character of Handwriting. By PERSIFOR FRAZER. Illustrated. Philadelphia: J. B. Lippincott Co. 1894. 8vo. xi and 218 pp.

The Law relating to losses under a Policy of Marine Insurance. By C. R. TYSER. London: Stevens & Sons, Lim. 1894. 8vo. xvii and 232 pp. (10*s.* 6*d.*)

A Handy Guide to the Licensing Acts. By H. W. LATHAM. London: Stevens & Sons, Lim. 1894. 8vo. xxii and 149 pp. (5*s.*)

The Finance Act, 1884, so far as it relates to the Death Duties and the new Estate Duty. With Notes and Forms. By J. E. HARMAN. London: Stevens & Sons, Lim. 1894. 8vo. xi and 114 pp. (5*s.*)

A Guide to the new Death Duty. By EVELYN FREETH. London: Stevens & Sons, Lim. 1894. 8vo. vi and 187 pp. (7*s.* 6*d.*)

The Editor cannot undertake the return or safe custody of MSS. sent to him without previous communication.

1793

THE

LAW QUARTERLY REVIEW.

EDITED BY

SIR FREDERICK POLLOCK, BART., M.A., LL.D.

CORPUS PROFESSOR OF JURISPRUDENCE IN THE UNIVERSITY OF OXFORD.

VOL. X.

WITH A GENERAL INDEX TO VOLS. I—X.

LONDON:

STEVENS AND SONS, LIMITED, 119 & 120 CHANCERY LANE.

AGENT FOR UNITED STATES OF AMERICA, THE BOSTON BOOK CO., BOSTON.

AGENT FOR CANADA, THE CARSWELL CO. LIMITED, TORONTO.

OXFORD: AT THE CLARENDON PRESS.

1894.

Oxford
HORACE HART, PRINTER TO THE UNIVERSITY

INDEX

TO THE

LAW QUARTERLY REVIEW

VOLS. I—X (1885–1894).

[Names in CAPITALS are of contributors. The titles of books reviewed are printed in *italics*. Books merely acknowledged, without comment, are not indexed. Titles of Notes are followed by (*n.*).]

Acollas (E.).—*Le Droit de la Guerre*, iv. 223.

'Actio Personalis moritur cum Persona' in the Law of Scotland (R. M. WILLIAMSON), x. 182.

Adam (H. F. G.).—*La question des assurances contre les accidents devant la commission du travail*, v. 324.

Adams (Sir F. O.) and Cunningham (C. D.).—*The Swiss Confederation*, v. 432.

Adams (H. C.).—*Public Debts*, iii. 354.

ADAMS, JOHN R.—Betterment, ix. 229; A Reply on the Factors Act, v. 311; Registration of Title and Forged Transfers, viii. 151; The Vagliano Case (*n.*), vii. 295.

Addison (C. G.).—*The Law of Torts* (ed. Horace Smith and A. P. Perceval Keep), iii. 237; ix. 381; *The Law of Contracts* (ed. Horace Smith and A. P. Perceval Keep), viii. 168.

Admiralty Jurisdiction (*n.*), viii. 99.

Admiralty Law, Two Points of (R. G. MARSDEN), ii. 357.

ADOLPHUS, JOHN LEYCESTER (the late).—The Circuiteers: an Eclogue, i. 232.

After-acquired Property in Bankruptcy (E. COOPER WILLIS, Q.C.), x. 240.

Agents and Servants, Liability for the Torts of (Sir F. POLLOCK), i. 207.

Alcorta (A.).—*Cours de droit international public*, tr. par E. Lehr, v. 216.

Aliens, The Right of, to enter British Territory (W. F. CRAIES), vi. 27.

'Aliens not the subjects of any foreign State' (*n.*), i. 517.

Allan (C. E.).—*The Law relating to Goodwill*, v. 319.

Allen (E. K.).—*The Stamp Duties on Sea Insurances*, vii. 89.

American Law Schools (*n.*), v. 227, 228.

American Statute Law (SIMEON E. BALDWIN), iii. 158.

Anderson (T. Kerr).—*A Treatise on the Law of Execution*, vi. 222.

Anderson (Y.).—*See* Leigh.

Andrews (C.M.).—*The Old English Manor*, viii. 339; ix. 293.

Annual County Courts Practice, The (Judge Heywood), vi. 347; viii. 260.

Annual Digest, The (ed. A. Emden, H. Thompson, and W. A. Brigg), i. 274; ii. 266; iii. 245; iv. 358; vi. 225; vii. 192; ix. 195.

Annual Digest, The (ed. John Mews and A. H. Todd), iii. 352; vi. 225; ix. 195.

Annual Practice, The (ed. T. Snow, H. Winstanley, F. A. Stringer, and C. Burney), 1884–5, i. 133; 1885–6, ii. 108; 1887–8, iv. 103; 1888–9, v. 94; 1889–90, vi. 104; 1890–91, vii. 90; 1892, viii. 92.

Annual (Winding Up) Practice, 1893 (ed. A. Emden and T. Snow), ix. 95.

ANSON, Sir W. R.—The Franchise Bill, i. 25; The Government of Ireland Bill and the Sovereignty of Parliament, ii. 427; Derry *v.* Peek in the House of Lords, vii. 72; Terminology in Contract, vii. 337.

Anson (Sir W. R.).—*Law and Custom of the Constitution*, ii. 391; viii. 252.

Antoine (C.).—*Fiore's Nouveau droit international public*, iii. 349.

Antwerp Congress and the Assimilation of Mercantile Law, The (THOMAS BARCLAY), ii. 66.

Apostasy at Common Law (F. W. MAITLAND), ii. 153.

Appeal, Court of, System of reporting in (*n.*), i. 518.

Arbitration, The London Chamber of, (EDWARD MANSON), ix. 86.

Arbuthnot (R. G.).—*See* Collins.

Archaic Communities, The Survival of (F. W. MAITLAND):
- I. The Malmesbury Case, ix. 36.
- II. The Aston Case, ix. 211.

Archaism in Modern Law (Sir F. POLLOCK), ix. 271.

Archbold's *Pleading and Evidence in Criminal Cases* (ed. W. Bruce), ix. 379.
Archibald's *Practice at Judges' Chambers* (ed. W. F. A. Archibald and P. E. Vizard), ii. 400.
Archibald (W. F. A.).—*See* Broom.
Arndts (L.).—*See* Pfaff.
Aschrott (P. F.).—*Das Englische Armenwesen*, ii. 242; *Strafensystem und Gefängniswesen in England*, iii. 353; *The Reform of the German Penal System*, iv. 89; *Die Behandlung der verwahrlosten und verbrecherischen Jugend und Vorschläge zur Reform*, viii. 346.
Ashley (M.).—*See* Fustel de Coulanges.
Ashley (W. J.).—*An Introduction to English Economic History and Theory*, ix. 291.
Assizes, Spring and Autumn (C. E. THORNHILL), ii. 465.
Assumpsit, Mr. Ames on the history of (*n.*), iv. 480.
Athenian Tribunals (*n.*), vii. 110.
Atkinson (W. H. B.).—*The Land Transfer Bill*, 1887, iv. 224.
Attempt and Intent, Some recent decisions concerning (SHOWELL ROGERS), x. 164.
Augée-Dorlhac.—*Condition juridique des enfants naturels*, viii. 92.
AUSTIN, G. C.—The Dwight Method of Legal Instruction, ix. 171.
Autran (F. C.).—*Revue internationale du droit maritime*, iii 79; *Code international de l'abordage maritime*, vi. 224.

Baden-Powell (B. H., C.I.E.).—*The Land Systems of British India* (Sir A. C. LYALL, K.C.B.), ix. 23.
Baker (C. D.).—*Code of Evidence reported by the Practice Commission* (U.S.A.), ii. 256.
BAKEWELL, J. H.—The American and British Systems of Patent Law, vii. 364.
BALDWIN, SIMEON E.—American Statute Law, iii. 158.
Balfour (D.).—*A Handbook of Court of Session Practice*, vii. 384.
Ball (W. E.).—*Leading Cases on Torts*, i. 121.
Ballade of Judicial Notice (SHOWELL ROGERS), ix. 285.
Bankruptcy Report, 1890, The (*n.*), vii. 12.
Banning (H. T.).—*Law of Marriage Settlements*, i. 271; *The Statute Law of the Limitation of Actions*, viii. 346.
Barber (W.).—*See* Dart.
Barberot (E.).—*Du monopole des agents de change*, iv. 105.
BARCLAY, THOMAS.—The New French Divorce Act, i. 355; The Antwerp Congress and the Assimilation of Mercantile Law, ii. 66; Batbie on *Droit Administratif*, iii. 71; Trade Names in France, iii. 221; Naturalisation (*re Bourgoise*, Infants), iv. 226; The Law of France relating to Industrial Property, v. 324; The Definition of General Average, vii. 22; The Exshaw Case, viii. 332; The Institute of International Law, x. 348.
Barclay (T.).—*The French Law of Bills of Exchange*, i. 131; *Les effets de commerce dans le droit anglais*, i. 131; *Emancipation contractuelle de la femme mariée en Angleterre*, i. 131; *The Law of France relating to industrial property*, vi. 90.
Barnes (G. S.).—*See* Buxton.
Barons' *Geschichte des Römischen Rechts*, i. 112.
Bar's *Private International Law* (ed. G. R. Gillespie), viii. 341.
Bastable (C. F.).—*Public Finance*, viii. 347.
Batbie (A.).—*Traité théorique et pratique de droit public et administratif*, iii. 71.
BATESON, H. D.—Employers' Liability, v. 179; Through Bills of Lading, v. 424.
Bazalgette (C. N.) and Humphreys (Geo.).—*The Law relating to Local and Municipal Government*, i. 378; *The Law relating to County Councils*, v. 91.
BEACH, CHARLES FISK, jun.—Receivers' Certificates, iii. 429.
Beach (C. F., jun.).—*The Law of Contributory Negligence*, ii. 506; *The Modern Law of Railways*, vi. 340; *The Law of Private Corporations*, viii. 171; *Modern Equity Jurisprudence*, ix. 381; *The Law of Public Corporations*, x. 92.
Beatitude of Seisin, The (F. W. MAITLAND), iv. 24, 286.
Beddoes (W. F.).—*The Law of Mortgage*, ix. 290.
Behring Sea Arbitration.—*See* Bering.
Belgium, Public Meetings and Public Order in (H. LENTZ), iv. 159.
Bell's *Dictionary of the Law of Scotland* (ed. G. Watson), vi. 216.
Benjamin (J. P.).—*See* Bennett.
BENNETT, Hon. E. H.—Public Meetings and Public Order: United States, iv. 257; Benjamin on *Sales*, iv. 470.
Bentham, Notes inédites de, sur le droit international (ERNEST NYS), i. 225.
Bentham (J.).—*A Fragment on Government* (ed. F. C. Montague), vii. 192.
BERGNE, Sir J. H. G., K.C.M.G.—The International Copyright Union, iii. 14.
Bering Sea Question, The (T. B. BROWNING), vii. 128, 199, 315.
Bering Sea Arbitration, The (*n.*), ix. 309; x. 4.
Betterment (JOHN R. ADAMS), ix. 229.
Betterment in its Legal Aspect (P. V. SMITH), x. 117.
BEVEN, THOMAS.—Smith *v.* Baker and Volenti non fit injuria, viii. 202.
Beven (T.).—*The Law of Negligence*, vi. 97.
BEWES, W. A.—The Declaration of Future Rights, viii. 48.
Bewes (W. A.).—*A Manual of Vigilance Law*, iv. 478; *Copyright, Patents, Designs, Trade Marks, &c.*, viii. 93.
Biddle (A.).—*The Law of Insurance*, x. 97.
BIGELOW, MELVILLE M.—Mistake of Law as a ground of Equitable Relief, i. 298; Mistake of Law again, ii. 78; Definition

of Fraud, iii. 419; Definition of Circumvention, v. 140.
Bigelow (M. M.).—*The Law of Estoppel*, iii. 99; vi. 457; Story's *Equity Jurisprudence*, iii. 463; *The Law of Fraud*, iv. 472; vii. 191; *The Law of Torts*, v. 212.
Bills of Exchange, Unification of the Law of (J. Dove Wilson), ii. 297.
Bills of Lading Act, 1855, Some Defects in the (T. G. Carver), vi. 289.
Bills of Sale, Ought they to be Abolished? (J. B. Matthews), vii. 74.
Bills of Sale Acts, The (E. Cooper Willis, Q.C.), iii. 300.
Bing (F. M.).—*La société anonyme en droit allemand*, ix. 195.
Bishop (J.P.).—*New Commentaries on Marriage, Divorce and Separation*, viii. 170.
Bispham (G. T.).—*The Principles of Equity*, iv. 213.
Blackburn's (Lord) *The Effect of the Contract of Sale* (ed. J. C. Graham), ii. 251.
Blackstone's *Elements of Law* (ed. V. Blickensderfer), v. 323.
Blackstone's Original Prospectus (T. E. Holland), ii. 83.
Blair (P. J.).—*Parliamentary, County Council, and Municipal Elections*, x. 96.
Blakesley, G. H.—Manorial Jurisdiction, v. 113; Remoteness and Perpetuity, II, vi. 426; Masuirs, viii. 323.
Blakesley (G. H.).—*Comment on the Majority Report of the London Companies Commission*, i. 275.
Blaramberg (N.).—*Essai comparé sur les institutions, les lois et les mœurs de la Roumanie depuis les temps les plus reculés jusqu'à nos jours*, iii. 469.
Blickensderfer (V.).—*See* Blackstone.
Blumenthal (J.).—*Code de Commerce de Roumanie*, v. 323.
Bodkin (A. H.).—*See* Wigram.
Bogišić (V.).—*De la forme dite 'Inokosna' de la famille rurale chez les Serbes et les Croates*, i. 119; *The Montenegrin Civil Code*, iv. 465.
Bompas (H. B.).—*See* Shelford.
Bond, Henry.—Possession in the Roman Law, vi. 259.
Bondage in England, The Last Days of: I. (I. S. Leadam), ix. 348; II. (n.), (J. A. Lovat-Fraser), x. 1.
Books, size notation of (*n.*), viii. 84.
Boone (C. T.).—*Law of Mortgages*, i. 371.
Borgmeyer (C. L.).—*The American Corporation Legal Manual*, ix. 292.
Bosanquet (F.A.) and Marchant (J.R.V.).—*The Statutes of Limitations of England and Ireland*, x. 90.
Boston University Law School (*n.*), ii. 405.
Bourdin's *Exposition of the Land Tax* (ed. S. Bunbury), ii. 102.
Bourgoise Case in London and Paris, The (Malcolm McIlwraith), vi. 379.
Bourinot (J. G.).—*The Constitutional History of Canada*, iv. 474; *The Federal Government in Canada*, vi. 99.
Boutiron (A.).—Testa's *Droit public international maritime*, iii. 96.
Boutmy (E.).—*Études de Droit Constitutionnel*, i. 258; *Le développement de la constitution et de la société politique en Angleterre*, iii. 245; *The English Constitution* (tr. I. M. Eaden), vii. 286.
Bowen, Rt. Hon. Lord.—The Law Courts under the Judicature Acts, ii. 1.
Bowen, Lord (Rt. Hon. Lord Justice Davey), x. 211.
Box, M. H.—Division of Property into Real and Personal Estate, iii. 406.
Boxing, The Law of (E. Manson), (n.), vi. 110.
Boyd (A. C.).—*See* Wheaton.
Bracton, The Text of (P. Vinogradoff), i. 189.
Bracton, Conditional Fees in (n.), ii. 276.
Bracton, Roman Law in (T. E. Scrutton), i. 425.
Bracton's Note Book (P. Vinogradoff), iv. 436.
Bradley, F. E.—Modern Legislation in the United Kingdom, x. 32.
Brantly (W. T.).—*Principles of the Law of Personal Property*, vii. 284.
Bray (E.).—*Principles of Discovery*, i. 267.
Breach of Promise of Marriage (J. Dundas White), x. 135.
Brett (T.).—*Leading Cases in Modern Equity*, iii. 463; viii. 96; *Commentaries on the present Laws of England*, vi. 455; vii. 288; and *see* Clerke.
Brice (Seward, Q.C.).—*The Law of Corporations and Companies*, ix. 382.
Brickdale, C. Fortescue.—Registration of Title in Prussia, iv. 63; Registration of Title in Ireland, vii. 184.
Brickdale (C. Fortescue).—*Registration of Title to Land*, iii. 86; *The Practice of the Land Registry under the Transfer of Land Act*, 1862, viii. 174; *Land Transfer in various Countries*, x. 362.
Bridel (L.).—*La femme et le droit*, i. 512.
Brigg (W. A.).—See *Annual Digest*.
Brissaud (J.).—*See* Dickel.
Bristowe, L. S.—Legal Restrictions on Gifts to Charity, vii. 262.
Bristowe (L. S.).—*See* Tudor's *Charitable Trusts*.
Brooke (R.).—*Treatise on the Office and Practice of a Notary* (ed. G. F. Chambers), vii. 91.
Broom, H.—*Constitutional Law* (ed. G. L. Denman), i. 370; *Commentaries on the Common Law* (ed. W. F. A. Archibald and H. W. Greene), i. 273; iv. 477.
Broughton (L.).—*Estoppel by matter of record in Civil Suits in India*, x. 87.
Brown (A.).—*Law and Practice of Enfranchisements and Commutations*, iv. 356; and *see* Stephen's *Commentaries*.
Brown (C. H.).—*See* Key.
Brown (J. C. C.).—*The Law of Nuisance in Scotland*, viii. 94.

Brown (R.). — *The English Doctrine of Consideration in Contract*, vii. 282.
Browne (G., Q.C.) and Powles (L. D.).—*The Law and Practice in Divorce and Matrimonial Causes*, vi. 104.
Browne (Irving).—See *Ruling Cases.*
Browne (J. H. Balfour, Q.C.) and Theobald (H. S.).—*The Law of Railway Companies*, iv. 218.
BROWNING, T. B.—The Bering Sea Question, vii. 128, 315.
Bruce (G.) and Jemmett (C. F.).—*Jurisdiction and Practice in Admiralty Actions*, ii. 518.
BRUCE, T. BOSTON.—The New Italian Criminal Code, v. 287.
Bruce (W.).—*See* Archbold.
Brunner (H.) and others.—*Handbuch des deutschen Handels-, See- und Wechselrechts*, ii. 246; *Ueberblick über die Geschichte der französischen, &c. Rechtsquellen*, vi. 217.—*See* Hastie.
Bryce (Rt. Hon. James, M.P.). — *The American Commonwealth*, v. 196; *Legal Studies*, x. 97.
BUCKLAND, W. W.—Difficulties of Abstract Jurisprudence, vi. 436.
BUDD, HENRY.—The United States Circuit Courts of Appeals, ix. 51.
Bullen (T. J.) and Clifford (C. W.).—*Precedents of Pleadings*, iv. 478.
Bunch *versus* Great Western Railway Company (G. H. POWELL), ii. 469.
Burbidge (G. W.).—*A Digest of the Criminal Law of Canada*, vi. 346.
Burney (C.).—*Daniell's Chancery Forms*, i. 384. *See* Annual Practice, Chadwyck-Healey, and Wilson.
Burrell's (Sir W.) *Cases determined by the High Court of Admiralty* (ed. R. G. Marsden), ii. 255.
BURTON, E. W.—Federation and Pseudo-Federalism, v. 170.
Buswell (H. F.).—*Law of Insanity*, i. 381; *The Statute of Limitations and Adverse Possession*, vi. 94.
BUTCHER, J. G., M.P.—The Law of Conspiracy in England and Ireland, vi. 247.
Butcher (S. H.).—*Irish Land Acts and their operation*, iii. 246.
BUTTERWORTH, A. R.—The Vagliano Case in Australia, x. 40.
Buxton (Sydney) and Barnes (G. S.).—*A Handbook to the Death Duties*, vi. 226.
Byles (Sir J. B.).—*The Law of Bills of Exchange, &c.* (ed. M. B. Byles and A. K. Loyd), vii. 287.
Bythewood and Jarman's *System of Conveyancing* (ed. L. G. G. Robbins and A. T. Murray), vi. 214; x. 96.

Cababé (M.).—*Attachment of Debts*, iv. 222; *Interpleader in the High Court of Justice and in the County Courts*, iv. 475.
Cairns, Lord (G. W. HEMMING, Q.C.), i. 365.
Calvo (C.).—*Le droit international théorique et pratique*, iv. 102, 467.
Campbell (E. L.).—*Science of Law according to the American Theory of Government*, ii. 401.
CAMPBELL, ROBERT.—Land Tenure in Scotland and England, i. 175, 400; ii. 166.
Campbell (R.).—*The Law relating to the Sale of Goods*, vii. 379; and see *Revised Reports* and *Ruling Cases.*
Campbell (R. V.).—*Principles of Mercantile Law*, vii. 88.
Canada Law Journal, The (*n.*), iv. 121, 225.
Canadian Constitution, The (J. E. C. MUNRO), iv. 185.
Canonists, Note on the (*n.*), iv. 359.
Card (E. R. de).—*Les destinées de l'arbitrage international*, viii. 261.
Carle (G.).—*Le origini del diritto romano*, v. 95, 429; *La vita del diritto nei suoi rapporti colla vita sociale*, vii. 193.
Carnazza (M. A.).—*La istituzione dei feziali in rapporto al diritto pubblico romano*, iv. 106.
Carpmael (A.) and Carpmael (E.).—*Patent Laws of the World*, i. 260; v. 213.
Carran (L.).—*La philosophie religieuse en Angleterre depuis Locke jusqu'à nos jours*, iv. 224.
Carson (H. L.).—*The Supreme Court of the United States* (Sir F. POLLOCK), viii. 162.
Carson (T. H.).—*See* Shelford.
CARTER, A. T. — Curiosities of Copyright Law, iv. 172; Of Dock Warrants, Warehouse-Keepers' Certificates, &c., viii. 301.
Carter (J. C.).—*Proposed Codification of our Common Law*, i. 369.
CARVER, T. G.—On some defects in the Bills of Lading Act, 1855, vi. 289; Expenses at a Port of Refuge, viii. 229; The Law relating to Carriage of Goods by Sea, ii. 97; vii. 288.
Casperez (A.).—*The Law of Estoppel in British India*, x. 86.
Castle (E. J.).—*The Law of Rating*, ii. 265.
Catalogue of Law Works (Stevens & Sons), vii. 194.
CATOR, R. B. P.—Special Indorsement or Originating Summons? ix. 238.
CAUTHERLEY, CHAS.—The County Court System, vii. 346.
Cautherley (C.).—*Costs in County Courts*, ii. 516.
Cautley (H. S.).—*See* Stutfield.
Cecil (Lord R.).—*See* Hurst.
Ceylon, The Administration of Justice in, (L. B. CLARENCE), ii. 38.
Chadwyck-Healey (C. E. H., Q.C.), Wheeler (P. F.), Jenkins (C. E. E.), and (third ed.) Burney (C.).—*The Law of Joint Stock Companies*, iii. 245; x. 359.
CHALLIS, H. W.—On a point in the law of Executory Limitations, i. 412; Determinable Fees, II, iii. 403; The Squatter's Case, v. 185; The Compulsory Registration of Titles, vi. 157; Are Leaseholds Tenements? vi. 69; A Song of Uses, vi. 330; Elphinstone on *Searches*, iii. 460.

Challis (H. W.).—*Law of Real Property*, i. 379; viii. 175; and *see* Hood.
CHALMERS, M. D., His Honour Judge.—An Experiment in Codification, ii. 125; The County Court System, iii. 1; Trial by Jury in Civil Cases, vii. 15; Vagliano's Case, vii. 216; Wanted—A Law Dictionary, viii. 283; On Imprisonment for Debt (*n.*), iv. 480.
Chalmers (Judge).—*The Sale of Goods*, vi. 345; vii. 84; *The Law of Bills of Exchange, &c.*, iii. 353; vii. 287.
Chalmers (Judge) and Hough (E.).—*The Bankruptcy Act*, 1883, iii. 79.
CHAMBERLAIN, V. I.—The Early History of the Incorporated Law Society, viii. 40.
Chambers (G. F.).—*The Law relating to Local Government*, v. 91; *The Law relating to Local Rates*, v. 324; and *see* Brooke.
Chamier (D.).—*A Manual of Roman Law*, ix. 293.
Channing (E.).—*Town and County Government in the English Colonies of North America*, i. 132.
Chan-Toon.—*The nature and value of Jurisprudence*, iv. 358; v. 322.
Charity, Legal Restrictions on Gifts to (L. S. BRISTOWE), vii. 262.
Chassaing (J. B.).—*Notions usuelles de droit public*, iii. 469.
Chaster (A. W.).—*The Powers, Duties, and Liabilities of Executive Officers*, iii. 97; iv. 103; v. 94.
Chattels, Gifts of, without Delivery: I. (Sir F. POLLOCK), vi. 446. II. (Sir H. W. ELPHINSTONE), vi. 451.
Chattels, The Seisin of (F. W. MAITLAND), i. 324.
Chattels, Title to, by Possession (J. F. CLERK), vii. 224.
Chattels as Heirlooms (Sir H. W. ELPHINSTONE), (*n.*), vi. 459.
Cherry (R. R.).—*Lectures on the Growth of Criminal Law in Ancient Communities*, vii. 89.
Children of Naturalized British Subjects (L. L. SHADWELL), vi. 67.
Chisholm (J. C.).—*The Coal Mines Regulation Act*, 1887, iv. 224.
Chitty's *Equity Index* (ed. W. F. Jones and H. E. Hirst), i. 259; iii. 89, 239; iv. 99, 355; v. 90; vi. 102.
Chitty's *Statutes* (ed. J. M. Lely), x. 357.
Chitty on *Contracts* (ed. J. M. Lely and Nevill Geary), vi. 221.
Chose in Action, What is a? (Sir H. W. ELPHINSTONE), ix. 311.
Chose in Action, Is a Right of Action in Tort a? (T. CYPRIAN WILLIAMS), x. 143.
Choses in Action (CHARLES SWEET), x. 303.
Chrétien (A.).—*See* Pasquale-Fiore.
Circuiteers, The: An Eclogue (JOHN LEYCESTER ADOLPHUS), i. 232.
Circuits, The Bar and the (J. A. LOVAT-FRASER), ix. 261.
Circumvention, Definition of (MELVILLE M. BIGELOW), v. 140.
Citation of Text-books as authorities (*n.*), iv. 360.
CLARENCE, L. B.—The Administration of Justice in Ceylon, ii. 38.
CLARK, E. C.—Jurisprudence in Legal Education, i. 201.
Clark (E. C.).—*Cambridge Legal Studies*, v. 92.
Clark (J. W.).—*Students' Precedents in Conveyancing*, x. 97.
Clark (J. W.).—*See* Goodeve and Elphinstone.
Clark's *Precedents in Conveyancing* (Sir H. W. ELPHINSTONE), (*n.*), x. 99.
Clark Hare.—*See* Hare.
Clarke (Sir E., Q.C., M.P.).—*The Law of Extradition*, iv. 352.
Clercq (M. de).—*Recueil des Traités de la France*, ii. 512.
CLERK, J. F.—Title to Chattels by Possession, vii. 224.
Clerk (J. F.) and Lindsell (W. H. B.).—*The Law of Torts*, vi. 97.
Clerke (A. St. J.).—*The Law and Practice under the Settled Land Acts*, 1882 to 1890, vii. 284.
Clerke (A. St. J.) and Brett (T.).—*The Conveyancing Acts, &c.*, vi. 106.
Clerke (A. St. J.) and Humphry (H. M.).—*Law relating to Sales of Land*, i. 509.
Clifford (C. W.).—*See* Bullen.
Clifford (F.).—*A History of Private Bill Legislation*, iii. 246.
Clode (W.).—*The Law and Practice of Petition of Right*, iv. 211.
Clowes (W.).—*See* Seton.
Clunet (Edouard).—*Journal du droit International Privé*, ii. 102.
Cobbett (Pitt).—*Leading Cases and Opinions on International Law*, viii. 259.
Code Civil Espagnol.—*See* Levé.
Codification, An Experiment in (M. D. CHALMERS), ii. 125.
Codification in New York (*n.*), ii. 420, 521.
COGLIOLO, PIETRO.—Sir Henry Maine, iv. 129.
COHEN, ARTHUR, Q.C.—Notes on Current Points, i. 397; A Note on the Factors Acts, iv. 247; The Amendment of the Law relating to Factors, v. 132.
Collett (C.).—*The Law of Torts, &c.*, iii. 354.
Collins (R. H., Q.C.) and Arbuthnot (R. G.).—Smith's *Leading Cases*, iii. 468.
Colonial Legislatures, powers of (*n.*), i. 393.
Colyar (H. A. de).—*The Law of Guarantees*, ii. 100.
Combothecra (X. S.).—*Les actions paulienne en droit romain*, vii. 383.
Commercial Law, Conference on, at Antwerp (*n.*), i. 518.
Commercial Law, A Doubtful Point in (E. C. C. FIRTH), viii. 305.
Common Law and Conscience in the Ancient Court of Chancery (L. OWEN PIKE), i. 443.

Common, Origin of Rights of (T. E. SCRUTTON), iii. 373.
Company Law, The Reform of (E. MANSON), v. 61.
Company Law, Tinkering (E. MANSON), vi. 428.
Compensation for Misdescription in Sales of Land (W. WEBSTER), iii. 54.
Compulsory Pilotage (R. G. MARSDEN), iv. 51.
Conflict of Laws, Cases on (*n.*), viii. 101, 102.
Consideration, A Difficulty in the Doctrine of (E. GRUEBER), ii. 33.
Conspiracy, House of Lords on (*n.*), viii. 101.
Construction, On the limits of Rules of (Sir HOWARD W. ELPHINSTONE), i. 466; ii. 110 (*n.*).
Contraband of War, Rice as (*n.*), i. 277.
Contract, History of (JOHN W. SALMOND), iii. 166.
Contract, Terminology in (Sir W. R. ANSON), vii. 337.
Contract by Letter (L. C. INNES), ix. 316.
Contracts by Correspondence (*n.*), viii. 185.
Conveyancer in the Thirteenth Century, A (F. W. MAITLAND), vii. 63.
Conveyancing Act, 1881, s. 4 (*n.*), vi. 230.
Conveyancing under the Ptolemies (E. P. FRY), viii. 56.
Cook (W. I.).—Tudor's *Charitable Trusts*, vi. 339.
Cook (W. W.).—*Treatise on the Law of Stockholders*, iv. 88.
COOKSON, MONTAGUE, Q.C.—Mr. Justice Pearson, ii. 373.
COOLIDGE, Rev. W. A. B.—The Swiss Federal Court, iv. 209; v. 149.
COOPER WILLIS, E., Q.C.—The Bills of Sale Acts, iii. 300.
Copinger (W. A.).—*The Law of Copyright*, ix. 287.
Copinger (W. A.) and Munro (J. E. C.).—*The Law of Rents*, iii. 240.
Copyright, English Authors and American (T. E. SCRUTTON), iv. 345.
Copyright, National and International (*n.*), iii. 352.
Copyright in Lectures delivered at the Universities (*n.*), ii. 109.
Copyright Law, Curiosities of (A. T. CARTER), iv. 172.
Copyright Question, The (E. M. UNDERDOWN, Q.C.), ii. 213.
Copyright Union, The International (Sir J. H. G. BERGNE), iii. 14.
Copyrights, Foreign, Registration of (*n.*), viii. 1.
Cordery (A.).—*Law relating to Solicitors*, iv. 105.
CORSI, Senator TOMMASO.—Public Meetings and Public Order: Italy, iv. 78.
Co-Service, Statutory Changes in the Doctrine of, in the United States (W. M. McKINNEY), vi. 189.
Coulanges.—*See* Fustel de Coulanges.
County Court System, The (Judge CHALMERS), iii. 1.
County Court Reform (FRANCIS K. MUNTON), v. 134.
County Court System, The (C. CAUTHERLEY), vii. 346.
County Courts Consolidation Act, The (Judge CHALMERS), v. 1.
Courcy (A. de).—*Questions de droit maritime*, ii. 90; iv. 221.
CRACKANTHORPE, M., Q.C.—*See* COOKSON.
CRAIES, W. F.—The Right of Aliens to enter British Territory, vi. 27; The Compulsion of Subjects to leave the Realm, vi. 388; and *see* Hardcastle.
Crawley (C.).—*The Law of Husband and Wife*, viii. 171.
Criminal Conspiracy in England and Ireland, The Law of: (1) KENELM E. DIGBY, vi. 129, 363; (2) J. G. BUTCHER, M.P., vi. 247.
Criminal Procedure in France (MALCOLM McILWRAITH), vi.i. 193.
Cripps (C. H., Q.C.).—*The Law of Compensation*, viii. 342.
Cross-Examination: A Socratic Fragment (E. MANSON), viii. 160.
Cross-examination of Witnesses (*n.*), viii. 115.
Croswell (S. G.).—*The Law relating to Executors and Administrators*, vi. 213.
Cunningham (C. D.).—*See* Adams (Sir F. O.).
Cunningham (W.).—*Politics and Economics*, i. 276; *Christian Opinion on Usury*, i. 276.
Cunynghame (H.).—*The Law of Patents*, x. 360.
Current Points, Notes on (A. COHEN, Q.C., M.P.), i. 397.
Currie (J. W.).—*The Confirmation of Executors in Scotland*, vii. 84.
Custom in the Common Law (F. A. GREER), ix. 153.
'Customs' (*n.*), ii. 112.
Cutler (E., Q.C.), Smith (T. E.), and Weatherly (F. E.).—*The Law of Musical and Dramatic Copyright*, vii. 88; viii. 177.
Cutler (J.) and Griffin (E. F.).—Powell's *Law of Evidence*, i. 514.

Daguin (C.).—*See* Lachau.
Daguin (F.), Dubarle (L.), and Gourd (A.).—*Collection des principaux Codes étrangers*, ii. 106.
Daireaux (E.).—*El abogado de si mismo*, iii. 469.
Dale (C. W. M.) and Lehmann (R. C.).—*Digest of Cases overruled, &c.*, iii. 350; and *see* Seton and Lewin.
Dale (R. A.).—*A County Courts Formulist*, iii. 246.
Dalhousie University Law School, The (*n.*), vi. 471.
'Damnum sine iniuria' (*n.*), ii. 117.
Daniell's *Chancery Forms* (ed. C. Burney), i. 384.
Dareste (R.).—*Le nouveau code civil du Monténégro*, iv. 465; *Études d'histoire du droit*, v. 321.

Darlington (H. R.).—*The Railway and Canal Traffic Acts*, v. 320.
Darras (A.).—*Du droit des auteurs et des artistes dans les rapports internationaux*, iii. 352.
Dart's *Vendors and Purchasers* (W. Barber, Q.C., R. B. Haldane, and W. R. Sheldon), iv. 223, 457.
Dartmoor, The Antiquities of (C. I. ELTON, Q.C., M.P.), vi. 207.
DAVEY, The Rt. Hon. Lord Justice.—Lord Bowen, x. 211.
David *v.* Sabin, The Case of (F. H. MAUGHAM), ix. 264.
Davidson (M. G.).—*Concise Precedents in Conveyancing*, ii. 101; *Precedents*, Vol. I. (ed. T. C. Wright and J. K. Darley), ii. 510; *Concise Precedents in Conveyancing*, vii. 86.
Davis (G. B.).—*Outlines of International Law*, iv. 87.
Davis (H.).—*American Constitutions*, ii. 88.
Davis (J. E.).—*County Court Practice*, iii. 90.
Day (S. H.).—*See* Rogers.
Deacon and the Jewess, The; or, Apostasy at Common Law (F. W. MAITLAND), ii. 153.
'Death resulting from one and the same cause' (*n.*), ix. 7.
Declareuil (J.).—*La justice dans les coutumes primitives*, vii. 90.
De Colyar (H. A.).—*See* Colyar.
Deeds of Arrangement Act, 1887, The (E. COOPER WILLIS, Q.C.), iv. 426.
DE HART, E. L.—The Extradition of Political Offenders, ii. 177; The Liability of Shipowners at Common Law, v. 15.
Delacroix (F.).—*Les suggestions hypnotiques—une lacune dans la loi*, iii. 469.
Delano (C. G.).—Dunning's *Reports*, i. 385.
Denman (G. L.).—Broom's *Constitutional Law in relation to Common Law*, i. 370.
Denmark, 'A Poor Man's Lawyer' in (A H. JESSEL), vii. 176.
DENNIS, A. H.—The Law of Maintenance and Champerty, vi. 169; and *see* Key.
Derry *v.* Peek in the House of Lords: I. (Sir F. POLLOCK), v. 410; II. (Sir W. R. ANSON), vi. 72.
Desjardins (A.).—*Traité de droit commercial maritime*, ii. 93; iv. 101; vii. 275.
Determinable Fees, I. (J. C. GRAY), iii. 399; II. (H. W. CHALLIS), iii. 403.
Devonshire Domesday, The (*n.*), ii. 91; ix. 22, 309 (*n.*).
DICEY, A. V., Q.C.—Federal Government, i. 80; Private International Law as a Branch of the Law of England, vi. 1; vii. 113; The Criteria of Jurisdiction, viii. 21; The Conflict of Laws (*n.*), iii. 102; Clark Hare's *Law of Contracts*, iii. 229.
Dicey (A.V., Q.C.).—*The Law of the Constitution*, i. 502; iii. 204 (Sir H. JENKYNS, K.C.B.); *England's Case against Home Rule*, iii. 69; and *see* Stocquart.
Dickel (K.).—*Étude sur le nouveau code civil du Monténégro* (tr. J. Brissaud), vii. 192.
DIGBY, KENELM E.—The Law of Criminal Conspiracy in England and Ireland, vi. 129, 363.
Digby (K. E.).—*Introduction to the History of the Law of Real Property*, ix. 90.
Divorce Act, The New French (THOMAS BARCLAY), i. 355.
Dixon (W. J.).—*Probate and Administration Law*, i. 273; *Law and Practice of Divorce*, viii. 175.
Dixon's *Law of the Farm* (ed. Aubrey J. Spencer), ix. 89.
Dock Warrants, Warehouse-Keepers' Certificates, &c. (A. T. CARTER), viii. 301.
Domesday Celebration, The (*n.*), ii. 421.
Domesday, The Devonshire, ii. 91; ix. 22, 309 (*n.*).
Douglas (R. R.).—*Index to recent Maritime Law Decisions*, iv. 222.
Douthwaite (W. R.).—*History of Gray's Inn*, ii. 259.
Dowell (S.).—*Acts relating to the Income Tax*, ii. 99; *History of Taxation and Taxes in England*, ii. 272.
DU CANE, Sir E. F.—Prins' *Criminalité et Répression*, ii. 227.
Du Cane (Sir E. F.).—*Punishment and Prevention of Crime*, ii. 99.
Durand (L.).—Lioy's *Philosophie du Droit*, iv. 220.
Dwight Method of Legal Instruction, The (G. C. AUSTIN), ix. 171.

Eaden (I. M.).—*See* Boutmy.
Earle (J.).—*A Handbook to the Land-Charters and other Saxonic Documents*, v. 205.
Early English Land Tenures:
I. Mr. Vinogradoff's Work (MAXIME KOVALEVSKY), iv. 266.
II. Domesday Studies (C. I. ELTON, Q.C.), iv. 276.
Easements in Roman Law, The Quasi-Grant of (E. C. C. FIRTH), x. 323.
Easterby (W.).—*History of the Law of Tithes in England*, iv. 478.
École des Sciences Politiques, Une (MAX LECLERC), v. 242.
Editorial note on completion of Vol. X, x. 289.
EDMUNDS, LEWIS.—On the Rejection of Hearsay, v. 265.
Edmunds (Lewis) and Renton (A. Wood).—*The Law and Practice of Letters Patent for Inventions*, vi. 343.
Edwards (C. J.).—*The Law of Execution*, iv. 473.
Edwards (W. D.).—*The Law of Property in Land*, viii. 91.
Egypt, Justice in (HAROLD A. PERRY), i. 342.
Ellis (A. M.).—*Guide to the House Tax Acts*, ii. 103; *Guide to the Income Tax Acts*, ii. 273; x. 93.

Ellis (A. L.).—*Trustees' Guide to Investments*, iii. 244.
Ellis (C. E.).—*See* Leigh.
Ellis (Havelock).—*The Criminal*, vi. 338.
Elmer (J.).—*The Practice in Lunacy*, viii. 346.
ELPHINSTONE, Sir HOWARD W.—On the limits of Rules of Construction, i. 466; The Transfer of Land, ii. 12; Notes on the English Law of Marriage, v. 44; Notes on the Alienation of Estates Tail, vi. 280; Gifts of Chattels without Delivery, II, vi. 451; What is a Chose in Action? ix. 311; Clark's *Precedents in Conveyancing* (*n.*), x. 99.
Elphinstone (Sir H. W.) and Clark (J. W.).—*Searches*, iii. 460; and *see* Goodeve.
Elphinstone (Sir H. W.), Norton (R. F.), and Clark (J. W.), *The Interpretation of Deeds*, ii. 104.
Elsmie (G. R.).—*Crime on the Peshawar Frontier*, i. 113.
Elting (Irving).—*Dutch Village Communities on the Hudson River*, ii. 268.
ELTON, C. I., Q.C.—Early English Land Tenures: II. Domesday Studies, iv. 276; The Antiquities of Dartmoor, vi. 207; Villainage in England, viii. 117.
Emden (A.).—*Law of Building, Building Leases, and Building Contracts*, i. 506; and see *Annual (Winding Up) Practice* and *Annual Digest*.
Emden (A.) and Pearce-Edgcumbe (E. R.).—*Complete Collection of Practice Statutes, Orders, and Rules*, i. 511; iii. 245.
EMERTON, WOLSELEY.—Stoic Terminology in Roman Law, iii. 64.
Emerton (Wolseley). — *The Threefold Division of Roman Law*, v. 93.
Eminent Domain (CARMAN F. RANDOLPH), iii. 314.
Employers' Liability (H. D. BATESON), v. 179.
Employers' Liability and Trade Union Cases (*n.*), viii. 4.
Engelhardt (E.).—*Histoire du droit fluvial*, v. 322.
English Law. I-L. Victoriae (Sir F. POLLOCK), iii. 343.
English and Scotch Law, Some points of difference between (J. A. LOVAT-FRASER), x. 340.
Equity, Early English (Justice O. W. HOLMES), i. 162.
Equity, Administration of, through Common Law Forms (SYDNEY G. FISHER), i. 455.
Errera (P.).—*Les Masuirs*, viii. 96; (G. H. BLAKESLEY), viii. 323.
Escheat, The Law of (F. W. HARDMAN), iv. 318.
Estates Tail, Notes on the Alienation of (Sir H. W. ELPHINSTONE), vi. 280.
Evans (Frank).—*See* Palmer.
EVANS, R. WATSON.—The Trustee Act, vi. 50.
Evans (W.)—*Law of Principal and Agent*, iv. 219.
Everest (L. F.) and Strode (E.).—*Law of Estoppel*, i. 127.
Eversley (W. P.).—*Law of Domestic Relations*, i. 381.
Evidence in Criminal Cases of similar but unconnected Acts (Sir HERBERT STEPHEN), iv. 71.
Evidence, Written, The Superiority of (J. W. SALMOND), vi. 75.
Executions as a Risk to Purchasers of Land (*n.*), ii. 519.
Executor continuing testator's business.—*See* Indemnity.
Executory Limitations, A point in the Law of (HENRY W. CHALLIS), i. 412.
Exeter, Deanery of, Case of the (EDWARD A. FREEMAN), iii. 280.
Exshaw Case, The (T. BARCLAY), viii. 322.
Extradition of Political Offenders, The (E. L. DE HART), ii. 177.
Extraterritorial Crime, Report on, v. 95.

Factors Acts, A Note on the (A. COHEN, Q.C.), iv. 247.
Factors, On the Amendment of Law relating to (A. COHEN, Q.C.), v. 132.
Factors Acts, A Reply on the (JOHN R. ADAMS), v. 311.
Fahlcranz (G.).—*Legal Procedure in England, with Swedish Parallels*, ii. 271.
Fanshawe (E. L.).—*See* Hobhouse.
FARRELLY, M. J.—The Basis of Private International Law, ix. 242; Recent Questions of International Law, x. 254.
Farwell (G.) and Sheldon (W. R.).—*A Concise Treatise on Powers*, ix. 290.
Federal Government (A. V. DICEY), i. 80.
Federation and Pseudo-Federalism (E. W. BURTON), v. 170.
Feoffment and Livery of Incorporeal Hereditaments (L. OWEN PIKE), v. 29.
Feoffment and Livery of Incorporeal Hereditaments (*n.*), v. 218, 328.
Ferguson (J.).—*Railway Rights and Duties*, v. 209.
Finch (G. B.).—*Cases on the English Law of Contract*, ii. 88; *Legal Education*, ii. 104.
FIRTH, E. C. C.—Married Women's Debts, viii. 62; A Doubtful Point in Commercial Law, viii. 305; A Doubt on the Statute of Frauds, ix. 366; The Quasi-Grant of Easements in R. L., x. 323.
Firth (T. W. S.).—*The Law relating to the Liability of Employers*, vii. 193.
FISHER, J. R.—A Chapter in the History of the Law of Libel, x. 158.
FISHER, SYDNEY G.—Administration of Equity through Common Law Forms, i. 455.
Fisher's *Digest* (ed. J. Mews, C. M. Chapman, H. H. W. Sparham, and A. Todd), i. 244.
Fisher (W. R.).—*The Forest of Essex*, iv. 209.
Fishery, Public Rights of (*n.*), iii. 357.

Fiske (John).—*Civil Government in the United States*, vii. 90.
Fitzpatrick (J.) and Fowke (V. de S.).—*The Secretary's Manual*, ix. 292.
Flach (J.).—*Les origines de l'ancienne France*, iii. 233.
Foa (E.).—*The Relationship of Landlord and Tenant*, vii. 385.
Foreign Copyrights, Registration of (*n.*), viii. 1.
Foreign Marriage Acts (*n.*), viii. 98.
Forged Transfers, Registration of Title and (JOHN R. ADAMS), viii. 151.
Fort (H.).—*See* Talbot.
Fortescue's *Governance of England* (ed. C. Plummer), ii. 268.
Foster (A. La Trobe).—*See* Oldham.
Foster (C. J.).—*Principles and Practice of the Supreme Court Code* [New Zealand], ii. 260.
Foster (J.).—*Men-at-the-Bar*, i. 388.
Foville (A. de).—*Le Morcellement*, ii. 512.
Fowke (V. de S.).—*The Companies Acts*, 1862–1890, ix. 289; and *see* Fitzpatrick.
Fowler (R. L.).—*Codification in New York*, i. 369.
France, Criminal Procedure in (MALCOLM McILWRAITH), viii. 193; Public Meetings and Public Order in (A. GIGOT), iv. 165; Trade Names in (THOMAS BARCLAY), iii. 221.
Franchise Bill, The (Sir W. R. ANSON), i. 25.
Franck (A.).—*Philosophie du droit civil*, iii. 78.
Frankalmoign in the Twelfth and Thirteenth Centuries (F. W. MAITLAND), vii. 354.
Franqueville (Comte de).—*Le gouvernement et le parlement britanniques*, iii. 470; iv. 90.
FRASER, HUGH.—The Privileges of the Press in Relation to the Law of Libel, vii. 158.
Fraser (H.).—*The Law of Torts*, iv. 350; *The Law of Libel in its relation to the Press*, vi. 107.
FRASER, J. A. LOVAT.—The Bar and the Circuits, ix. 261; The Last Days of Bondage in Great Britain, x. 1; Some points of difference between English and Scotch Law, x. 340.
Fraud, Definition of (MELVILLE M. BIGELOW), iii. 419.
Frauds, Section 17 of the Statute of, redrawn and illustrated (Mr. Justice STEPHEN and Sir F. POLLOCK), i. 1.
Frauds, Statute of, A Doubt on the (E. C. C. FIRTH), ix. 366.
FREEMAN, EDWARD A.—The Case of the Deanery of Exeter, iii. 280.
French Copper Ring Drama, The Final Act of the (MALCOLM McILWRAITH), viii. 154.
French Schools of Law, The (MALCOLM McILWRAITH), vi. 42.
Frost (R.).—*The Law and Practice relating to Letters Patent for Inventions*, vii. 276.
FRY, Right Hon. Sir EDWARD.—Specific Performance and Laesio Fidei, v. 235; Some Aspects of Law Teaching, ix. 115.
Fry (Sir E.) and Fry (E. P.).—*A Treatise on the Specific Performance of Contracts*, viii. 177, 250.
FRY, E. P.—Conveyancing under the Ptolemies, viii. 56.
Fusion (*n.*), iv. 225.
Fustel de Coulanges (*n.*), vi. 109; *Recherches sur quelques problèmes d'histoire*, i. 500; *Étude sur le titre 'De Migrantibus' de la loi salique*, ii. 274; *Le problème des origines de la propriété foncière*, v. 324; *Histoire des Institutions politiques de l'ancienne France*, vi. 220; *The Origin of Property in Land* (tr. M. Ashley), vii. 287.
Future Rights, The Declaration of (W. A. BEWES), viii. 48.

GALLUP, A.—Railway Mortgages and Receiver's Debts in the United States, iv. 300.
Gaming Act, The (*n.*), viii. 270.
Garnot (X.).—*Condition de l'étranger dans le droit public français*, iii. 351.
Garrett (E. W.).—*The Law of Nuisances*, vii. 188.
Geare (E. A.).—*The Investment of Trust Funds*, iii. 97; v. 436; and *see* Mackenzie.
Geary (N.).—*Law of Theatres and Music Halls*, i. 387; *The Law of Marriage and Family Relations*, ix. 193; and *see* Chitty's *Law of Contracts*.
General Average, The Definition of (THOMAS BARCLAY), vii. 22.
German Code of Criminal Procedure, The (H. A. D. PHILLIPS), x. 16.
German Patent Act, The New (E. SCHUSTER), viii. 76.
German Universities, Examination for Law Degrees in (*n.*), v. 97.
Gibson (A.).—*Intermediate Law Examination made Easy*, ii. 515.
Gibson (A.) and McLean (R.).—*Students' Conveyancing*, i. 511; *Student's Practice of the Courts*, ii. 275.
GIGOT, A.—Public Meetings and Public Order: France, iv. 165.
Gillespie (G. R.).—*See* Bar.
Gisira (M. di).—*L'equilibrio europeo studiato ne' trattati de' secoli xvi. et xvii.*, v. 95.
GLASSON, E.—Sir Henry Maine, iv. 129.
Glasson (E.).—*Étude sur Gaius*, i. 508; *Histoire du droit et des institutions de la France*, iv. 100, 356; *The German Code of Civil Procedure* (tr. E. Glasson, E. Lederlin, and F. R. Dareste), iv. 221.
Glegg (A. T.).—*A practical Treatise on the Law of Reparation*, ix. 89.
Gneist's *History of the English Constitution* (tr. P. A. Ashworth), ii. 269.
Gneist (R.).—*See* Keane.
Goddard (J. L.).—*A Treatise on the Law of Easements*, vii. 191.

Godefroi (H.).—*The Law relating to Trusts and Trustees*, vii. 284.
Goldschmidt (L.).—*System des Handelsrechts, &c.*, vi. 217; *Handbuch des Handelsrechts*, viii. 336.
Goodeve (L. A.).—*Modern Law of Real Property*, i. 505; (ed. Sir H. W. Elphinstone and J. W. Clark), vii. 382; *Modern Law of Personal Property*, iii. 465; (ed. Sir H. W. Elphinstone and J. W. Clark), ix. 92.
Gore Browne (F.).—*See* Jordan.
Gosset (J. A.).—*Practical Guide to Account Stamp Duty, Customs, and Inland Revenue Act*, 1881, iv. 106.
Gover (W. H.).—*Hints as to advising on Title*, vi. 96; viii. 176.
Government of Ireland Bill and the Sovereignty of Parliament (Sir W. R. ANSON), ii. 427.
Gradenwitz (O.).—*Interpolationen in den Pandekten*, v. 316; *Die Ungültigkeit obligatorischer Rechtsgeschäfte*, v. 317.
Graham (J. C.).—*Designs and Trade Marks*, v. 433; *Is Proof anything more than Probability?* viii. 95.
GRAY, JOHN C.—Determinable Fees, I, iii. 399.
Gray (John C.).—*Rule against Perpetuities*, ii. 394; *Select Cases on the Law of Property*, v. 94; vii. 191.
Gray (Morris).—*Communication by Telegraph*, i. 497.
Green Bag, The (*n.*), iv. 113.
Greene (H.).—*See* Archibald.
GREENWOOD, H.—Registration—or Simplification—of Title? vi. 144.
Greenwood (H.).—*Social Diseases and Worse Remedies*, vii. 192.
Greenwood (H.) and Knowles (L.).—*Real Property Statutes*, i. 132.
GREER, F. A.—Custom in the Common Law, ix. 153.
Gresham University Commission, The (*n.*), ix. 210; x. 302.
Griffith (Wm.).—*The Indian Evidence Acts*, vi. 226.
Grigsby (W. E.).—*See* Story.
GRUEBER, E.—Holtzendorff's *Encyclopädie*, i. 62; Franz von Holtzendorff, v. 190; The Decline of Roman Jurisprudence, vii. 70; A Difficulty in the Doctrine of Consideration, ii. 33.
Grueber (E.).—*Voigt on the XII Tables*, i. 235; *The Lex Aquilia*, ii. 379; *Das römische Recht, &c.*, v. 215.
Gull (Sir W. C.).—*See* Lindley.

Hacon (W. Llewellyn).—*See* Turner.
Haldane (R. B.).—*See* Dart.
Hall (W. E.).—*Treatise on International Law*, vi. 340.
Hamilton (G. B.).—*Treatise on the Law of Covenants*, iv. 353; *The Trustee Acts*, v. 207; and *see* Mackenzie.
HAMILTON, G. F.—Origin of the Lovat Myth, ii. 497; On the Doctrine of Vyse *v.* Foster, iii. 211; Are the Weekly Notes authority? (*n.*), iii. 356.
Hamilton (W. F.).—*Manual of Company Law*, vii. 282.
Hammick (J. T.).—*The Marriage Law of England*, iii. 244.
HAMMOND, W. G.—The Conflict of Laws, iii. 101.
Hannen (J. C.) and Pritchard (W. T.).—*Pritchard's Admiralty Digest*, iii. 224.
Hansell (E. R.).—*See* Williams.
Happy Dispatch, The (H. M. HUMPHRY), ix. 373.
Hardcastle (H.).—*The Construction and Effect of Statute Law* (ed. W. F. Craies), ix. 190.
HARDMAN, F. W.—The Law of Escheat, iv. 318.
Hare (J. I. Clark).—*Lectures on American Constitutional Law*, ii. 390; *The Law of Contracts*, iii. 229.
Harris (R.).—*Hints on Advocacy*, iii. 226; vi. 107.
Harrison (W.).—*Chief Rents and other Rentcharges*, ii. 98.
Harvard Law Review, The (*n.*), ix. 112.
Harvard Law School, The (*n.*), iii. 118, 351.
HARVEY, W.—Insurance of Limited Interests, x. 48.
Hastie (W.).—*Outlines of Jurisprudence*, iv. 93; Kant's *Principles of Politics*, vii. 194.
Hayes and Jarman's *Concise Forms of Wills* (ed. W. B. Megone), ix. 291.
Head-notes, how not to write (*n.*), vi. 232; ix. 201.
Hearsay, On the Rejection of (LEWIS EDMUNDS), v. 265.
Hedderwick (T.C.H.).—*The Parliamentary Election Manual*, viii. 177.
Heimburger (K.).—*Die Reform der Verwaltungsrechtsprechung, &c.*, iv. 106; *Der Erwerb der Gebietshoheit*, v. 95.
HEMMING, G. W., Q.C.—The Law Reports, i. 288; Lord Cairns, i. 365.
Henschel (H.).—*Allgemeine Staatslehre als Einleitung in das Studium der Rechtswissenschaft*, vi. 347.
Herbert (T. A.).—*The History of the Law of Prescription in England*, viii. 91.
HERRIES, EDWARD, C.B.—Prof. Holland on *the European Concert in the Eastern Question*, i. 498.
Herschell (Lord).—*Bill for codifying the Law relating to the Sale of Goods*, iv. 461.
Hervieu (H.).—*Les Ministres*, ix. 385.
Hewett (E. P.).—*The Statutes of Limitations*, x. 90.
Heywood (His Hon. Judge).—See *Annual County Courts Practice.*
Highwayman's Case, The (*n.*), ix. 105, 197; x. 301.
Hindu Code, A Modern (Sir A. C. LYALL, K.C.B.), vi. 86.
Hindu Law in Madras (JOHN D. MAYNE), iii. 446.
Hippel (R.).—*Die Tierquälerei in der*

Strafgesetzgebung des In- und Auslandes, &c., viii. 346.
HIRSCHFELD, JULIUS.—Partnership with Limited Liability in Germany, iv. 62.
Hirst (H. E.).—See Chitty's *Equity Index.*
Hislop (R.).—*Lectures on Agricultural Law*, ii. 517; and *see* Young.
Hobbes (T.)—*The Elements of Law Natural and Politic* (ed. F. Tönnies), vi. 105.
Hobhouse (H., M.P.) and Fanshawe (E. L.).—*The County Councillor's Guide*, v. 91.
Hochheimer (L.).—*The Law relating to the Custody of Infants*, viii. 96.
Hodgkins (T., Q.C.).—*The Law affecting Voters' Lists* (Canada): *The Canadian Franchise Acts*, iii. 99; *The Bills of Exchange Act*, 1890 (Canada), vii. 91.
Hofmann (F.).—*See* Pfaff.
HOLLAND, T. E.—The Literature of International Law in 1884, i. 100; International Law and Acts of Parliament, ix. 136; Blackstone's Original Prospectus (*n.*), ii. 83; Codification in New York (*n.*), iii. 247; The Schnaebele Affair (*n.*), iii. 355; Prize Courts (*n.*), iv. 107.
Holland (T. E.).—*The European Concert in the Eastern Question*, i. 498; *Elements of Jurisprudence*, ii. 267; iv. 221; vii. 87; x. 88.
Holman (H.).—*A Handy Book for Shipowners and Masters*, viii. 173.
HOLMES, Justice O. W., jun.—Early English Equity, i. 162.
Holmes (O. W., jun.).—*Il Diritto Comune* (tr. F. Lambertenghi), vi. 106.
Holtzendorff's *Encyclopädie* (E. GRUEBER), i. 62.
HOLTZENDORFF, F. VON.—Sir Henry Maine, iv. 129.
Holtzendorff (F. von).—*Handbuch des Völkerrechts*, ii. 84; iii. 463; (E. GRUEBER), v. 190.
Home Rule and Federation (*n.*), v. 325.
Homicide by Necessity (HERBERT STEPHEN), i. 51.
Hood (H. J.) and Challis (H. W.).—*The Conveyancing and Settled Land Acts*, v. 314.
Horoy.—*Droit international et droit des gens public*, iii. 350.
Hough (E.).—*See* Chalmers.
Houston (W.).—*Documents illustrative of the Canadian Constitution*, vii. 288.
Hudson (A. A.).—*The Law of Engineering and Building Contracts*, vii. 288.
Hughes (W. T.).—*Technology of Law*, x. 94.
Humphreys (G.).—*See* Bazalgette and Smith's *Mercantile Law.*
HUMPHRY, HUGH M.—The Land Transfer Bill, iii. 263; v. 275; The Happy Dispatch, ix. 373; The Judges' Report on Practice from a Chancery Point of View, viii. 289.
Hunter (W. A.).—*Introduction to Roman Law*, i. 376; *Roman Law*, i. 376; and *see* Muluk Chand.
Hurst (J.) and Cecil (Lord R.).—*The Principles of Commercial Law*, vii. 380.

Ihering (R. von).—*Der Besitzwille*, v. 315.
ILBERT, C. P.—Indian Codification, v. 347; Sir James Stephen as a Legislator, x. 222.
Illegitimate Children, Gifts to (*n.*), ii. 407.
Incorporated Law Society, Early History of the (V. I. CHAMBERLAIN), viii. 40.
Indemnity of Executor continuing Testator's Business (A. TURNOUR MURRAY), ix. 331.
Indermaur (J.).—*Student's Guide to the Common Law*, i. 258; *Student's Guide to Prideaux's Conveyancing*, i. 511; *Guide to Trusts and Partnership*, ii. 106; *The Principles of Equity*, iii. 246; vi. 226.
Indermaur (J.) and Thwaites (C.).—*Guide to the Law of Real and Personal Property*, ii. 402; x. 97; *Student's Guide to Specific Performance and Mortgages*, ii. 402; *The Law Student's Journal*, iii. 245.
Indian Codification (C. P. ILBERT), v. 347.
Indian Protectorate, Our (Sir A. C. LYALL), ix. 341.
Infants, Marriage Settlements of (*n.*), viii. 180.
Ingram (T. D.).—*History of the Legislative Union of Great Britain and Ireland*, iii. 348.
IN MEMORIAM:—Bowen, Lord (Lord Justice DAVEY), x. 211; Cairns, Lord (G. W. HEMMING, Q.C.), i. 365; Fustel de Coulanges (*n.*), vi. 109; Holtzendorff, F. von (E. GRUEBER), v. 190; Leake, Stephen Martin (*n.*), x. 2; Lowell, James Russell (*n.*), vii. 297; Maine, Sir Henry (Sir A. C. LYALL, K.C.B., E. GLASSON, F. VON HOLTZENDORFF, and PIETRO COGLIOLO), iv. 129; Muirhead, James (*n.*), vi. 109; Pearson, Mr. Justice (MONTAGUE COOKSON, Q.C.), ii. 373; Stephen, Sir James FitzJames (C. P. ILBERT, C.S.I.), x. 222.
INNES, L. C.—Contract by Letter, ix. 316.
Innes (L. C.).—*The Principles of the Law of Torts*, viii. 87; *A Digest of the Law of Easements*, ix. 196.
Inns of Court and Legal Education (*n.*), vi. 228.
Inns of Court Examinations (*n.*), ix. 21.
Insurance of Limited Interests (W. HARVEY), x. 48.
Insuring Safety, Duties of: The Rule in Rylands *v.* Fletcher (Sir F. POLLOCK), ii. 52.
International Arbitration (*n.*), ix. 111.
International Copyright Union, The (Sir J. H. G. BERGNE, K.C.M.G.), iii. 14.
International Disarmament (*n.*), vii. 110.
International Law, Questions of, arising from the operations of France in China (*n.*), i. 277.
International Law, The Literature of, in 1884 (T. E. HOLLAND), i. 100.

International Law and Acts of Parliament (T. E. HOLLAND), ix. 136.
International Law, Recent Questions of (M. J. FARRELLY), x. 254.
International Law, The Institute of (T. BARCLAY), x. 348.
Intimidation, Wrongful (S. H. LEONARD), vii. 375.
Ireland, Land System of (Judge O'CONNOR MORRIS), iii. 133; iv. 1.
Ireland, Registration of Title in (*n.*), viii. 97.
Italian Criminal Code, The new (T. BOSTON BRUCE), v. 287.
Italy, Gaming Contracts in (*n.*), vi. 349.
Italy, Foreign Companies in (MALCOLM M^cILWRAITH), x. 176.
Italy, Public Meetings and Public Order in (TOMMASO CORSI), iv. 78.

Jackson (M. S.).—*The Corporation Duty*, viii. 345.
Jacobs (Joseph).—*The Jews of Angevin England*, ix. 292.
Jacobs (M. W.).—*A Treatise on the Law of Domicil*, iv. 466.
Janet (P.).—*Histoire de la science politique dans ses rapports avec la morale*, iii. 469.
Japan, Piracy of English law-books in (*n.*), ix. 113.
Jarman (T.).—*A Treatise on Wills* (ed. L. G. G. Robbins), ix. 194.
Jeanvrot (V.).—*Revue de la réforme judiciaire*, ii. 103; iii. 98.
Jenkins (C. E. E.).—*See* Chadwyck-Healey.
Jenkins (J.).—*Laws concerning Religious Worship*, ii. 107.
JENKS, EDWARD.—The Early History of Negotiable Instruments, ix. 70.
Jenks (E.).—*History of the Doctrine of Consideration*, ix. 188.
JENKYNS, Sir H., K.C.B.—Dicey's *Law of the Constitution*, iii. 204.
Jephson (H.).—*The Platform: its rise and progress*, viii. 177.
JESSEL, A. H.—'A Poor Man's Lawyer' in Denmark, vii. 176.
Johnson (J.) and Johnson (T. H.).—*The Patentee's Manual*, i. 133; *A Treatise on the Law and Practice of Patents*, vi. 347.
Johnson (J., jun.).—*Rudimentary Society among Boys*, i. 275.
Jones (C.).—*The Solicitor's Clerk*, viii. 176.
Jones (D. A.).—*Interpretation of Commercial and Trade Contracts*, ii. 516.
Jones (W. F.).—*See* Chitty's *Equity Index*.
Jordan (W.) and Gore Browne (F.).—*A handy book of Joint Stock Companies*, ix. 289.
Jörs (Paul).—*Römische Rechtswissenschaft zur Zeit der Republik*, v. 202.
Judges' Report on Practice from a Chancery Point of View, The (H. M. HUMPHRY), viii. 289.
Judgment *in rem* by English Law (*n.*), ii. 406.
Judicial Power, The Waste of (T. SNOW), vii. 256.
Judicial departure, A recent (*n.*), v. 218.
Juridical Review, The (*n.*), ix. 113.
Jurisdiction, The Criteria of (A. V. DICEY, Q.C.), viii. 21.
Jurisprudence in Legal Education (E. C. CLARK), i. 201.
Jurisprudence, Abstract, Difficulties of (W. W. Buckland), vi. 436.

Kamarowsky (Comte L.).—*See* Westman.
Kant's Principles of Politics.—*See* Hastie.
Kaufmann (W.).—*The Egyptian State Debt* (ed. H. Wallach), ix. 195.
Keane (A. H.).—Gneist's *History of the English Parliament*, iii. 468.
Keener (W. A.).—*A Treatise on the Law of Quasi-Contracts*, ix. 209; x. 85.
Keep (A. P. Perceval).—*See* Addison.
Kelly (E.).—*French Law of Marriage*, i. 383.
Keltie (J. Scott).—*The Statesman's Year Book*, 1887, iii. 246.
Kennedy (G. G.).—*See* Roscoe.
Ker (W. C.).—*Law relating to Sale of Goods*, iv. 357.
Kerly (D. M.).—*A Historical Sketch of the Equitable Jurisdiction of the Court of Chancery*, vii. 87; *The Law of Trade-marks*, x. 356.
Kerr (Norman).—*Inebriety*, iv. 353; v. 435.
Kerr (R. M. N.).—*The Student's Blackstone*, vi. 346.
KEY, THOMAS.—Registration of Title to Land, ii. 324.
Key (Thomas), Brown (C. H.), and Dennis (A. H.).—Key and Elphinstone's *Conveyancing*, vii. 86; x. 361.
King's Peace, The (Sir F. POLLOCK), i. 37.
Koenig (Gustav).—*Ueber die Behandlung der falschen Angaben und der Verschweigungen im Lebensversicherungs-Vertrage*, v. 436.
Kohler (J.).—*Die Menschenhülfe im Privatrecht*, iii. 77; *Zur Lehre von den Pertinenzen*, iii. 470; *Ueber den Willen im Privatrecht*, vi. 105; *Rechtsvergleichende Studien über islamitisches Recht, &c.*, vi. 106; *Studien aus dem Strafrecht*, viii. 91; *Lehrbuch des Konkursrechts*, viii. 95.
KÖNIG, K. G.—Public Meetings and Public Order: Switzerland, iv. 169.
KOVALEVSKY, M.—Early English Land Tenures: I. Mr. Vinogradoff's work, iv. 266.
Kovalevsky (M.).—*Tableau des origines et de l'évolution de la famille, &c.*, vi. 347; *Modern Customs and Ancient Laws of Russia*, vii. 274.

Lachau (C.) and Daguin (C.).—*De l'exécution des jugements étrangers*, vii. 91.
Laferrière (F.).—*Essai sur l'histoire du droit français*, ii. 103.
Lambertenghi (F.).—*See* Holmes.

Lammasch (H.).—*Auslieferungspflicht und Asylrecht*, iii. 229.
Lamond (Elizabeth).—*Walter of Henley's Husbandry*, vii. 191.
Lamond (R. P.).—*The Scottish Poor Laws*, viii. 342.
Land Systems of British India, The (Sir A. C. LYALL, K.C.B.), ix. 23.
Land Transfer in Australasia (*n.*), iii. 489.
Land, The Transfer of (Sir HOWARD W. ELPHINSTONE), ii. 12.
Land, Transfer of (*n.*), ii. 397.
Land Transfer, &c. (by various authors), ii. 237.
Land Transfer Bill, The.—
I. (HUGH M. HUMPHRY), iii. 263; v. 275.
II. (C. H. SARGANT), iii. 272; iv. 225.
Land Tenure in Scotland and England (R. CAMPBELL), i. 175, 400; ii. 166.
Latorre (E. C.).—*Estudio sobre la Lei de Matrimonio Civil*, iv. 478.
Latour (J. I.).—*La mer territoriale*, vi. 224.
Law Classes in Public Schools, i. 515.
Law Courts under the Judicature Acts, The (Lord Justice BOWEN), ii. 1.
Law Dictionary, Wanted—A (Judge CHALMERS), viii. 283.
'Law of the Land,' Mr. Phelps on the (*n.*), iii. 116.
Law, Propositions of, some remarkable (*n.*), iv. 372.
Law Quarterly Review (Notice to Contributors), (*n.*), ii. 519.
Law Record, The (*n.*), ix. 112.
Law Reporting, The Present System of (JOHN MEWS), ix. 179.
Law Reporting, The Report of the Council of (*n.*), x. 209.
Law Reports, The History of the (Lord Justice LINDLEY), i. 138; (G. W. HEMMING, Q.C.), i. 287, 518; ix. 310 (*n.*).
Law Teaching, Some Aspects of (Right Hon. Sir EDWARD FRY), ix. 115.
Law, The Nature and Meaning of (Sir F. POLLOCK), x. 228.
Lawrance (G. W.).—*Precedents of Deeds of Arrangement*, ii. 265; iv. 223.
Lawrence (B. E.).—*The Laws affecting Married Women's Property*, i. 128.
Lawrence (T. J.).—*Essays on Modern International Law*, i. 240; *Handbook of Public International Law*, i. 513.
Laws, Conflict of (*n.*), iv. 230.
Lawson (W. N.).—*Patents and Trade Marks Practice*, i. 267; v. 433.
Lawyer's Companion, 1892, The, viii. 93.
LEADAM, I. S.—The Last Days of Bondage in England, ix. 348.
Leake, Stephen Martin (*n.*), x. 2.
Leake (S. M.).—*A Digest of the Law of Uses and Profits of land*, v. 211; *The Law of Contracts*, viii. 256.
Leaseholds, are they Tenements? (*n.*), v. 326.
Leaseholds—Are L. Tenements? (H. W. CHALLIS), vi. 69.
LECLERC, MAX.—Une École des Sciences politiques, v. 242; On Legal Institutions in England (*n.*), x. 209.
Lederlin (E.).—*See* Glasson.
Ledlie (J. C.).—*See* Sohm.
Lee (L. Yate) and Wace (H.).—*Law and Practice of Bankruptcy*, iii. 242; *The Bankruptcy Act*, 1890, vii. 193.
Lees (J. M.).—*Handbook of Pleading in the Sheriff Court*, iv. 356.
Lefort (J.).—*La condition de la propriété dans le nord de la France*, viii. 254.
Legal Administration, The Reform of (THOMAS SNOW), viii. 129.
Legal Composition, The Art of (Æ. J. G. MACKAY), iii. 326.
Legal Education (*n.*), vi. 228; vii. 111; viii. 19.
Legal Logic (*n.*), i. 279.
Legal Profession, Position and Prospects of the (E. S. ROSCOE), i. 314.
Leggett (E.).—*The law of Bills of Lading*, x. 89.
Lehmann (R. C.).—*See* Dale.
Lehr (E.).—*Manuel théorique et pratique des agents diplomatiques et consulaires français et étrangers*, v. 322; *Traité élémentaire de droit civil germanique*, viii. 347.
Leigh and Le Marchant's *Election Law* (ed. Y. Anderson and C. E. Ellis), i. 386.
Lely (J. M.).—*The Statutes of Practical Utility*, iii. 99; iv. 105; vii. 88, 111; viii. 94; x. 357; Wharton's *Law-Lexicon*, v. 319.
Lely (J. M.).—*See* Woodfall.
Lely (J. M.) and Peck (W. A.).—*Precedents of Leases for Years*, vi. 95.
Lenel (O.).—*Das Edictum perpetuum*, i. 374.
LENTZ, H.—Public Meetings and Public Order: Belgium, iv. 159.
Léo (A.).—De Martens' *Traité de droit international*, iii. 234; iv. 102.
LEONARD, S. H.—Wrongful Intimidation, vii. 375.
Letourneau (Ch.).—*Property: its origin and development*, ix. 95.
Levé (A.).—*Code Civil espagnol*, vii. 190.
Lovy (M.).—*Shorthand Notes*, ii. 400.
Lewin (T.).—*The Law of Trusts* (ed. C. C. M. Dale), viii. 174.
Lex Aquilia, A Disputed Point in the (G. Pacchioni), iv. 178.
Liabilities of Bailees according to German Law (ERNEST SCHUSTER), ii. 188.
Libel, a Chapter in the History of the Law of (J. R. FISHER), x. 158.
Liebermann, Dr. F. (*n.*), ix. 113.
LIGHTWOOD, JOHN M.—Possession in the Roman Law, iii. 32.
Lilly (W. S.) and Wallis (J. E.).—*The Law specially affecting Catholics*, x. 95.
LINDLEY, Rt. Hon. Lord Justice.—The History of the Law Reports, i. 137.

Lindley (Rt. Hon. Lord Justice), assisted by Gull (Sir W. C.) and Lindley (W. B.).—*Treatise on the Law of Partnership*, iv. 354; *A Treatise on the Law of Companies*, v. 436; *Supplement to a Treatise on the Law of Companies*, vii. 190; *The Partnership Act*, 1890, vii. 189.
Lindsell (W. H. B.).—*See* Clerk.
Lioy (D.).—*The Philosophy of Right*, vii. 193.
Lioy (D.).—*See* Durand.
Liszt (F. von).—*Lehrbuch des Deutschen Strafrechts*, iv. 478.
Litigation, Statistics of (*n.*), x. 210.
Local Government Bill, The (F. C. MONTAGUE), iv. 250.
Lockwood (F., Q.C., M.P.).—*The Law and Lawyers of Pickwick*, x. 362.
LORIMER, JAMES.—The Story of the Chair of Public Law in the University of Edinburgh, iv. 139.
Lorimer (J.).—*Studies National and International*, vii. 90.
Lovat Myth, Origin of the (G. F. HAMILTON), ii. 497.
LOVAT-FRASER, J. A.—The Bar and the Circuits, ix. 261; The Last Days of Bondage in Great Britain, x. 1; Some points of difference between English and Scotch Law, x. 340.
LOWELL, FRANCIS C.—Boone on *The Law of Mortgages*, i. 371.
Lowell, James Russell (*n.*), vii. 297.
Lowell (A. Lawrence).—*Essays on Government*, vi. 106.
Lowndes (R.).—*The Law of General Average*, iv. 216.
Loyd (A. K.).—*See* Byles.
Lunacy Acts Amendment Bill, The *n.*), iv. 361.
Lunacy Laws, The (T. RALEIGH), i. 150.
Lunacy, The Legal Test of (A. WOOD RENTON), vi. 317.
Lupton (F.).—*Law relating to Dogs*, iv. 358.
Lush (M.).—*Law of Husband and Wife*, i. 129; *Married Women's Rights and Liabilities*, iii. 468.
LYALL, Sir A. C.—Sir Henry Maine, iv. 129; A Modern Hindu Code, vi. 86; The Land Systems of British India, ix. 23; Our Indian Protectorate, ix. 341.
Lynch (H. F.).—*Redress by Arbitration*, iv. 357.
Lyon-Caen (Ch.) and Renault (L.).—*Traité de droit commercial*, v. 206; *Loi anglaise sur la faillite du 25 août* 1883, v. 215.
Lyon (G. E.).—*See* Redman.

McArthur (C.).—*Contract of Marine Insurance*, ii. 263; *The Contract of Marine Insurance*, vii. 89.
Macdonald (N. D.).—*Manual of the Criminal Procedure (Scotland) Act*, 1887, iv. 90.
MACDONELL, JOHN.—The New *Fisher's Digest*, i. 244.
Macdonell (John).—*See* Smith's *Mercantile Law*.
McGrath (R. H.).—*The Doctrine of Cy Pres*, iv. 105.
McILWRAITH, MALCOLM.—The French Schools of Law, vi. 42; The Rio Tinto Case in Paris, vi. 204; The Final Act of the French Copper Ring Drama, viii. 154; Criminal Procedure in France, viii. 193; Foreign Companies in Italy, x. 176; The Bourgoise Case in London and Paris, vi. 379.
MACKAY, Æ. J. G.—The Art of Legal Composition, iii. 326.
Mackay (Æ. J. G.).—*Manual of Practice in the Court of Session*, x. 91.
Mackenzie (M. M.), Geare (E. A.), and Hamilton (G. B.).—*Company Law*, x. 93.
Mackenzie (M. Muir).—*See* Wilson.
McKINNEY, W. M.—Statutory Changes in the doctrine of Co-Service in the United States, vi. 189.
Mackintosh (J.).—*The Roman Law of Sale*, viii. 344.
Maclachlan (D.).—Arnould on the *Law of Marine Insurance*, iii. 235; *The Law of Merchant Shipping*, viii. 258.
McLennan (J. F. and D.).—*The Patriarchal Theory*, i. 485.
Macnaghten (C.).—*See* Palmer.
Macnamara (W. H.).—Steer's *Parish Law*, iv. 97; *A Digest of the Law of Carriers*, v. 207; and *see* Paley.
Madras Code, The, iv. 358.
Maine, Sir Henry (Sir A. C. LYALL, K.C.B.; E. GLASSON; F. VON HOLTZENDORFF; and PIETRO COGLIOLO), iv. 129; (*n.*), ix. 21.
Maine (Sir Henry).—*The Whewell Lectures: International Law*, v. 77; *Études sur l'histoire du droit*, v. 79; *Le droit international: la guerre*, vi. 106.
Maintenance among the Kachins (*n.*), ix. 97.
Maintenance and Champerty, The Law of (A. H. DENNIS), vi. 169.
Maintenance and Education (T. K. NUTTALL), x. 330.
Maintenance Clauses (J. SAVILL VAIZEY), vii. 370.
MAITLAND, F. W.—The Seisin of Chattels, i. 324; The Deacon and the Jewess; or, Apostasy at Common Law, ii. 153; The Mystery of Seisin, ii. 481; The Beatitude of Seisin, iv. 24, 286; Possession for Year and Day, v. 253; Remainders after Conditional Fees, vi. 22; A Conveyancer in the Thirteenth Century, vii. 63; A New Point on Villein Tenure, vii. 174; Frankalmoign in the Twelfth and Thirteenth Centuries, vii. 354; The 'Quadripartitus,' viii. 73; The

Survival of Archaic Communities:—I. The Malmesbury Case: II. The Aston Case, ix. 36, 211; *Taltarum's* Case (*n.*), ix. 1.
Maitland (F. W.).—*Pleas of the Crown for the county of Gloucester*, i. 117; *Justice and Police* (*English Citizen Series*), i. 385; *Select Pleas of the Crown*, iv. 462; *Why the history of English Law is not written*, v. 93.
Malice in the Law of Torts (W. E. ORMSBY), viii. 140.
Manorial Jurisdiction (G. H. BLAKESLEY), v. 113.
MANSFIELD, Hon. J.—Maritime Lien, iv. 379.
Mansfield (J.).—*See* Marsden.
MANSON, EDWARD.—The Reform of Company Law, v. 61; The Law of Boxing (*n.*), vi. 110; Tinkering Company Law, vi. 428; Marital Authority, vii. 244; Cross-Examination: A Socratic Fragment, viii. 160; The London Chamber of Arbitration, ix. 86; Scenes in Court from the Year Books, x. 63.
Manson (E.).—*The Law of Trading and other Companies*, viii. 259.
Mantia (V. La).—*Cenni storici su le fonti del diritto Greco-romano e le assise e leggi dei re di Sicilia*, iii. 354.
Marchant (J. R. V.).—*See* Bosanquet.
'Mariage en droit canonique' (Sir W. G. F. PHILLIMORE, Q.C.), viii. 245.
Marital Authority (E. MANSON), vii. 244.
Maritime Conference at Washington, The (F. W. VERNEY), vi. 320.
Maritime Lien (Hon. J. MANSFIELD), iv. 379.
Markby (H.).—*Address to the Incorporated Law Society*, iii. 353.
Markby (Sir W.).—*Elements of Law*, i. 504; vi. 224.
Market Rights and Tolls, Report of the Royal Commission on (*n.*), v. 321.
Marriage Acts, Foreign (*n.*), viii. 98.
Marriage and Immoveables (HORACE NELSON), vi. 307.
Marriage Law in Malabar (H. H. SHEPHARD), viii. 314.
Marriage, Notes on the English Law of (Sir HOWARD W. ELPHINSTONE), v. 44.
Marriage, Offences against, and the relations of the Sexes (H. A. D. PHILLIPS), i. 471.
Marriages Regular and Irregular (*n.*), ix. 291.
Marriage Settlements of Infants (*n.*), viii. 180.
Married Women's Debts (E. C. C. FIRTH), viii. 62.
Married Women's Property Acts, Note on the (*n.*), iv. 479.
MARSDEN, R. G.—Two Points of Admiralty Law, ii. 357; Compulsory Pilotage, iv. 51; The Case of the *Zeta*, x. 113.
Marsden (R. G.).—*Collisions at Sea*, i. 251.
Marsden (R. G.) and Mansfield (J.).—*The Law of Collisions at Sea*, vii. 273.
Martens (F. de).—*See* Léo.
Martin (C. T.).—*The Record Interpreter*, viii. 175.
Massachusetts, Chancery in (E. H. WOODRUFF), v. 370.
Masuirs (G. H. BLAKESLEY), viii. 323.
MATHEWS, C. L.—Specially Endorsed Writs, viii. 320.
MATTHEWS, J. B.—Ought Bills of Sale to be Abolished?, vii. 74.
Matthews (J. B.).—*The Law relating to Married Women*, ix. 94; *Covenants in Restraint of Trade*, x. 94.
MAUGHAM, F. H.—The case of David *v.* Sabin, ix. 264.
May (J. W.).—*The Law of Insurance* (ed. F. Parsons), vii. 281.
Mayer (S.).—*The French Code of Commerce*, iv. 102.
MAYNE, J. D.—Hindu Law in Madras, iii. 446; McLennan on *The Patriarchal Theory*, i. 485.
Mayne (J. D.) and Smith (Lumley).—*A Treatise on Damages*, x. 358.
Mears (T. Lambert).—*See* Moore.
Megone (W. B.).—*Reports of Cases under the Companies' Acts*, vi. 347; and *see* Hayes and Jarman.
Meili (F.).—*Rechtsgutachten und Gesetzesvorschlag betreffend die Schuldexekution*, &c., iii. 231.
Mellor (F. H.).—*See* Short.
Merrill (G.).—*Studies in Comparative Jurisprudence*, iii. 246.
MEWS, JOHN.—The present system of Law Reporting, ix. 179; and see *Annual Digest* and Fisher's *Digest*.
Michael (M. J.).—Michael and Will's *Law relating to Gas and Water*, i. 266.
Miller (H. E.).—*The Ottoman Land Code* (tr. F. Ongley), ix. 94.
MILLIDGE, THOMAS.—Statutes of Limitations and Mortgagees, vii. 43.
MISPOULET, J. B.—Serafini on *Fraudulent Preference in Roman Law*, iv. 81.
Mistake of Law as a ground of Equitable Relief (M. M. BIGELOW), i. 298.
Mistake of Law again (M. M. BIGELOW), ii. 78.
Mistake and Materiality (M. M. BIGELOW), (*n.*), iii. 255.
Mistake, Effect of, on Delivery of Chattels (Mr. Justice WRIGHT and Sir F. POLLOCK), ii. 313.
MITCHESON, R. E.—Codification of the Law of Mortmain, v. 387.
Mitcheson (R. E.).—*Charitable Trusts*, iv. 222.
Modern Legislation in the United Kingdom (F. E. BRADLEY), x. 32.
Moncreiff (F.).—*The Law relating to Fraud and Misrepresentation*, vii. 280.

MONTAGUE, F. C.—The Local Government Bill, iv. 250; The Law of Settlement and Removal, iv. 40; and *see* Bentham.
Montana Cases, The (*n.*), v. 327.
Montenegrin Code, The (*n.*), iv. 372; ix. 22; and *see* Bogišić (V.) and Dareste (R.), iv. 465.
Montgomery (W. E.).—*The History of Land Tenure in Ireland*, vi. 107.
Moore's (H.) *Instructions for preparing Abstracts of Titles* (ed. R. Merivale and N. Pearson), ii. 404; *Handbook of Practical Forms* (ed. T. L. Mears), iii. 404; iv. 99.
Moore (J. B.).—*A Treatise on Extradition and Interstate Rendition*, vii. 283.
Moral Mania (A. WOOD-RENTON), iii. 339.
Morgan (G. O., Q.C.) and Wurtzburg (A.).—*Chancery Acts and Orders*, i. 274, 380.
Morrell (C. F.).—*Bankruptcy*, vii. 286.
MORRIS, His Honour Judge O'CONNOR.—The Land System of Ireland, iii. 133; iv. 1.
Morris (R. B.).—*Registration of Titles*, ii. 399; *Patents Conveyancing*, iii. 467.
Morrison (W. D.).—*Crime and its Causes*, vii. 287.
Mortmain, Codification of the Law of (R. E. MITCHESON), v. 387.
Mowbray Abeyance, The Determination of the (J. H. ROUND), x. 68.
Moyle (J. B.).—Roby's *Introduction to the Digest*, i. 106; *Institutes of Justinian*, vi. 225; *The Contract of Sale in the Civil Law*, viii. 344.
Moynier (G.).—*Conférence sur la convention de Genève*, vii. 193; *Les bureaux internationaux des Unions universelles*, viii. 169.
MUIRHEAD, J.—Grueber on the Lex Aquilia, ii. 379.
Muirhead (J.).—*A Historical Introduction to the Private Law of Rome*, iii. 74.
Muirhead (Professor James), (*n.*), vi. 109.
Muluk Chand, The Trial of, iv. 204.
MUNRO, J. E. C.—The Canadian Constitution, iv. 185.
Munro (J. E. C.).—*Patents, Designs, and Trade Marks Act*, 1883, i. 125; *The Constitution of Canada*, vi. 99; and *see* Copinger.
MUNTON, FRANCIS K.—County Court Reform, v. 134.
Murder from the best Motives (Sir HERBERT STEPHEN), v. 188.
MURRAY, A. TURNOUR.—Bankruptcy of Partners, vii. 53; Indemnity of Executor continuing Testator's Business, ix. 331; and *see* Bythewood.
Murray (D.).—*The Law relating to the Property of Married Persons*, vii. 385.
Murray (J. C.).—*The Law of Scotland relating to Notaries Public*, vi. 452.

Nasmith (D., Q.C.).—*Outline of Roman History*, vi. 345.
Nath (Lala Baij).—*Legal Maxims in Urdu*, ii. 509.
Naturalization (*re Bourgoise*), (T. BARCLAY), (*n.*), iv. 226; (A. V. DICEY, Q.C.), v. 438.
Naturalization Act, 1870, s. 7, The (L. L. SHADWELL), vii. 80.
Neale (J. A.).—*English Law by English Judges*, viii. 176.
Negotiable Instruments, The Early History of (EDWARD JENKS), ix. 70.
Neilson (George).—*Trial by Combat*, vi. 225.
NELSON, HORACE.—Marriage and Immoveables, vi. 307.
Nelson (Horace).—*Private International Law*, v. 435.
Nelson (R. A.).—*The Indian Penal Code*, ix. 385.
Nelson (J. H.).—*Indian Usage and Judge-made Law in Madras*, iii. 353, 446.
Neumann (L. de).—*Éléments du droit des gens moderne européen*, iii. 95.
New York, Codification in (*n.*), ii. 420, 521, 522.
New Zealand Poisoning Case, The (*n.*), iv. 479.
New Zealand, The Prescription Act in, (*n.*), x. 208.
New Zealand, Real Property in (*n.*), v. 96.
Nicolas (C.) and Pelletier (M.).—*Manuel de la propriété industrielle*, v. 94.
Norman (A. W.).—*A Digest of the Death Duties*, ix. 95.
Nuisances, On Licensing of (T. CRISP POOLE), iv. 312.
NUTTALL, T. K.—Maintenance and Education, x. 330.
Nys (Ernest).—*Notes inédites de Bentham sur le droit international*, i. 225; *Notes pour servir à l'histoire littéraire et dogmatique du droit international en Angleterre*, v. 95; *Les Origines du droit international*, x. 354.

O'CONNOR MORRIS, His Honour Judge.—*See* Morris.
Odgers (W. Blake).—*Law of Libel and Slander*, iii. 466; *The Principles of Pleading in Civil Actions*, viii. 92, 168.
Oldham (A.) and Foster (A. La Trobe).—*Law of Distress*, ii. 273; v. 214.
Ongley (F.).—*See* Miller.
Oppenheim (L.).—*Das ärztliche Recht zu körperlichen Eingriffen an Kranken und Gesunden*, ix. 93.
Oral Wills and Death-bed Gifts (JAMES SCHOULER), ii. 444.
Ordronaux (J.).—*Constitutional Legislation in the United States*, viii. 255.
ORMSBY, W. E.—Malice in the Law of Torts, viii. 140.
Osterrieth (A.).—*Altes und Neues zur Lehre vom Urheberrecht*, ix. 291.
Oswald (J. F.).—*Contempt of Court, &c.*, viii. 172.
Owen (D.).—*Declaration of War*, vi. 97.

OWEN, W. H.—The Reorganization of Provincial Courts, ix. 321.
Oxford Law Studies (Sir F. POLLOCK), ii. 453.

PACCHIONI, G.—A Disputed Point in the Lex Aquilia, iv. 178.
Page (W.).—*Three Early Assize Rolls for the County of Northumberland*, viii. 192.
Paley's *Law and Practice of Summary Convictions* (ed. W. H. Macnamara), ix. 191.
Palmer (F. B.) and Evans (Frank).—*Winding-up Forms and Practice*, ix. 383.
Palmer (F. B.).—*Winding-up Forms*, i. 274.
Palmer (F. B.) and Macnaghten (C.).—*Company Precedents*, iv. 478; v. 89.
Parker (F. R.).—*Powers, Duties, and Liabilities of an Election Agent and Returning Officer*, i. 270.
PARKER SMITH, J.—*See* Smith.
Parsons (F.).—*See* May.
Parsons (James).—*Principles of Partnership*, v. 431.
Partners, Bankruptcy of (A. TURNOUR MURRAY), vii. 53.
Partnership Act, 1890, The (*n.*), vi. 471.
Partnership with Limited Liability in Germany (JULIUS HIRSCHFELD), ix. 62.
Pasquale-Fiore.—*Le droit international codifié et sa sanction juridique* (tr. A. Chrétien), viii. 95.
Pataille (H.).—*See* Pouillet.
Patent Act, The New German (E. SCHUSTER), viii. 76.
Patent Law, The American and British Systems of (J. H. BAKEWELL), vii. 364.
Patent Right in England and the United States (A. WOOD RENTON), vii. 150.
Patterson (C. S.).—*Railway Accident Law*, iii. 93; *The United States and the States under the Constitution*, iv. 358.
Paturet (G.).—*La condition juridique de la femme dans l'ancienne Égypte*, ii. 512.
Payn (Howard).—*The Merchandise Marks Act*, 1887, iv. 220.
Peace (M. W.).—*The Coal Mines Regulation Act*, 1887, iv. 358.
Pearce-Edgcumbe (E. R.).—*See* Emden.
Pearson, Mr. Justice (MONTAGUE COOKSON), ii. 373.
Peck (W. A.).—*See* Lely.
Peek (Sir H.).—*Prospectus-Makers and the Public*, vi. 347.
Peers and the House of Commons (*n.*), viii. 179.
Pelletier (M.).—*See* Nicolas.
Per and Post, iv. 362.
Perrin (A.).—*Histoire de la vallée et du prieuré de Chamonix*, iv. 224.
PERRY, HAROLD A.—Justice in Egypt, i. 342.
Pfaff (L.) and Hofmann (F.).—*Lehrbuch der Pandekten* von L. Arndts, iii. 85.
Phelps (E. J.).—*See* Law of the Land.
Phillimore (Sir R.).—*Commentaries upon International Law*, i. 369.
PHILLIMORE, Sir W. G. F.—Spring and Autumn Assizes, iii. 100; Le Mariage en droit canonique, viii. 245.
PHILLIPS, H. A. D.—Offences against Marriage and the relations of the Sexes, i. 471; Preventive Jurisdiction, iii. 180; The German Code of Criminal Procedure, x. 16.
Phillips (H. A. D.).—*Our Administration of India*, ii. 253; *Manual of Revenue and Collectorate Law* (Calcutta), ii. 267; *Manual of Indian Criminal Law*, iv. 449; *Comparative Criminal Jurisprudence*, vi. 107.
Phipson (S. L.).—*The Law of Evidence*, ix. 191.
Piggott (F. T.).—*Law of Foreign Judgments*, i. 246; *The Law of Torts*, ii. 95.
PIKE, L. OWEN.—Common Law and Conscience in the ancient Court of Chancery, i. 443; Feoffment and Livery of Incorporeal Hereditaments, v. 29.
Pike (L. Owen).—*Year Books of the reign of Edward III. See* Year Books.
Pilling (W.).—*Order from Chaos*, iii. 94.
Pipe, The Great Roll of the, for the twelfth year of the Reign of King Henry the Second, v. 79.
Pirated English Law Books in the U. S. (*n.*), vi. 357.
Pitt-Lewis (G., Q.C., M.P.).—*County Court Practice*, iv. 103; vi. 226.
Politics and Business, the Study of, at the University of Pennsylvania (*n.*), vi. 226.
POLLOCK, Sir FREDERICK.—Section 17 of the Statute of Frauds redrawn and illustrated, i. 1; The King's Peace, i. 37; Liability for the Torts of Agents and Servants, i. 207; Duties of Insuring Safety: The Rule in Rylands *v.* Fletcher, ii. 52; Effect of Mistake on Delivery of Chattels, ii. 313; Oxford Law Studies, ii. 453; English Law. I–L. Victoriae, iii. 343; Derry *v.* Peek in the House of Lords, v. 410; Gifts of Chattels without Delivery, vi. 446; The Supreme Court of the United States, viii. 162; Archaism in Modern Law, ix. 271; The Nature and Meaning of Law, x. 228; What is a Thing? x. 318.
Pollock (Sir F.).—*Principles of Contract*, i. 385; *Oxford Lectures and other Discourses*, vii. 92; *The Law of Torts* (*n.*), viii. 278; and see *Revised Reports*.
POLLOCK, Sir RICHARD.—Elsmie on *Crime on the Peshawar Frontier*, i. 113.
POLLOCK, Sir W. FREDERICK.—Harris's *Hints on Advocacy*, iii. 226.
POOLE, T. CRISP.—On Licensing of Nuisances, iv. 312; Administration of the Law of Trusts by Joint Stock Companies, v. 395.
Port of Refuge, Expenses at a (T. G. CARVER), viii. 229.

Possession for Year and Day (F. W. MAITLAND), v. 253.
Possession in the Roman Law (HENRY BOYD), vi. 259.
Poste (Ed.). — *Gaii Institutionum iuris civilis commentarii quattuor*, vi. 453.
Potts (T. R.).—*Principles of the Law of Succession*, v. 212.
Pouillet (M.).—*Dictionnaire de la Propriété industrielle, artistique, littéraire*, iv. 106.
Powell's *Law of Evidence* (ed. J. Cutler and E. F. Griffin), i. 514.
POWELL, G. H.—Bunch *v.* Great Western Railway Company, ii. 469.
Powell (M.).—*See* Roscoe.
Powles (L. D.).—*See* Browne.
Pradier-Fodéré (P.).—*Droit International Public*, ii. 513; iv. 101.
Press, Privileges of the, in relation to the Law of Libel (HUGH FRASER), vii. 158.
Preventive Jurisdiction (H. A. D. PHILLIPS), iii. 180.
Prichard and Symonds.—*See* Tuke.
Prideaux (F.) and Whitcombe (J.).—Prideaux's *Precedents in Conveyancing*, v. 210; ix. 189.
Prins (A.).—*Criminalité et Répression*, ii. 227.
Pritchard (W. T.).—*See* Hannen.
Private International Law as a Branch of the Law of England (A. V. DICEY, Q.C.), vi. 1; vii. 113.
Private International Law, The Basis of (M. J. FARRELLY), ix. 242.
Private International Law, Mr. Farrelly on (*n.*), ix. 199.
Prize Courts (T. E. Holland), (*n.*), iv. 107.
Property, Division of, into Real and Personal Estate (M. H. BOX), iii. 406.
Provincial Courts, The Reorganization of (W. H. OWEN), ix. 321.
Prudhomme (H.).—*Code de commerce chilien*, viii. 262.
Public General Acts, 50–51 Vict., iv. 105.
Public Law, The Story of the Chair of, in the University of Edinburgh (J. LORIMER), iv. 139.
Public Meetings and Public Order:—
I. Belgium (H. LENTZ), iv. 159.
II. France (ALBERT GIGOT), iv. 165.
III. Italy (TOMMASO CORSI), iv. 78.
IV. Switzerland (K. G. KÖNIG), iv. 169.
V. The United States (E. H. BENNETT), iv. 257.
Pulling (A.).—*Index to the London Gazette*, ii. 101; *A Handbook for County Authorities*, v. 213.
Pulszky (A.).—*Theory of Law and Civil Society*, iv. 106, 454.
Punjab Code, The, iv. 478.

'Quadripartitus,' The (F. W. MAITLAND), viii. 73.
Quidde (L.).—*Deutsche Zeitschrift für Geschichtswissenschaft*, vii. 89.
Raffalovich (A.).—*La nouvelle loi sur les sociétés anonymes en Allemagne*, i. 269.
Railway Mortgages and Receiver's Debts in the United States (A. GALLUP), iv. 300.
Railway Passengers, Protection of (*n.*), viii. 182.
RALEIGH, THOMAS.—The Lunacy Laws, i. 150.
Raleigh (Thomas).—*An Outline of the Law of Property*, vi. 341.
Ralston (R.).—*Law relating to Discharge of Contracts*, ii. 403.
RANDOLPH, CARMAN F.—The Eminent Domain, iii. 314.
Rankine (John).—*The Rights and Burdens incident to the Ownership of Lands in Scotland*, viii. 94, 167.
Ratification of unauthorized agent's acts (*n.*), v. 440.
Rattigan (W. H.).—*The Science of Jurisprudence*, iv. 468; viii. 94.
Rawle (F.).—*Car Trust Securities* (U.S.A.), ii. 274.
Rawle (W. H.).—*The Educated Unemployed*, ii. 92.
Rawson (H. G.).—*Profit-Sharing Precedents*, vii. 386.
Rawson (H. G.) and Remnant (J. F.).—*The Pocket Law Lexicon*, ix. 196.
'Real and Personal' in English Law (T. CYPRIAN WILLIAMS), iv. 394.
Real Property Puzzles and Answers (*n.*), ii. 406, 524; ix. 21, 112.
Receivers' Certificates (C. F. BEACH, jun.), iii. 429.
Redfield (A. A.).—*See* Shearman.
Redman (J. H.) and Lyon (G. E.).—*Law of Landlord and Tenant*, iii. 96; ix. 384.
Reed (H.).—*Treatise on the Statute of Frauds*, i. 268.
Reed (J. C.).—*Conduct of Lawsuits*, ii. 107.
Registration of Deeds under Roman Dutch Law (E. J. TAYLOR), ii. 347.
Registration of Title to Land (THOMAS KEY), ii. 324.
Registration—or Simplification—of Title? (H. GREENWOOD), vi. 144.
Registration of Titles, Compulsory (H. W. CHALLIS), vi. 157.
Registration of Title in Ireland (C. FORTESCUE-BRICKDALE), vii. 184.
Registration of Title in Ireland (*n.*), viii. 97.
Registration of Title in Prussia (C. F. BRICKDALE), iv. 63.
Registration of Title and Forged Transfers (J. R. ADAMS), viii. 151.
Registries, Working of (*n.*), ii. 279.
Reich (Emil).—*Graeco-Roman Institutions*, vii. 86.
Remainders after Conditional Fees (F. W. MAITLAND), vi. 22.
Remnant (J. F.).—*See* Rawson.
Remoteness and Perpetuity, (1) J. SAVILL VAIZEY, vi. 410; (2) G. H. BLAKESLEY, vi. 426.
Renault (L).—*See* Lyon-Caen.

RENTON, A. WOOD.—The Legal Test of Lunacy, vi. 317.
Renton (A. W.).—*Monomanie sans Délire*, ii. 506; and *see* Edmunds.
Reports.—*See* Law Reports.
Représentation proportionnelle, iv. 476.
Revillout (E.).—*Cours de droit égyptien*, ii. 106; *Les obligations en droit égyptien*, iii. 467.
Revised Reports, The (ed. Sir F. Pollock, R. Campbell, and O. A. Saunders), vii. 13 (*n.*), 112 (*n.*), 379; viii. 175, 262.
Revue internationale de sociologie, ix. 114.
Revue du droit public, x. 112.
Ricci (F.).—*Des effets de l'extradition*, iii. 349.
Ringwood (R.).—*Outlines of the Law of Torts*, x. 359.
Rio Tinto Case in Paris, The (MALCOLM McILWRAITH), vi. 204.
Rio Tinto Case, The (*n.*), vi. 349.
Robbins (L. G. G.).—*See* Bythewood and Jarman's System of Conveyancing, and Jarman on Wills.
Roberts (W. H.) and Wallace (G.).—*Duty and Liability of Employers*, 505.
Robinson (W. C.).—*The Law of Patents for Useful Inventions*, vii. 277.
Robson (G. R.).—*Treatise on the Law of Bankruptcy*, iv. 104; *A Supplement to the above*, vii. 288.
ROBY, H. J.—The Twelve Tables of Gortyn, ii. 135.
Roby (H. J.).—*Introduction to the Study of Justinian's Digest*, i. 106.
ROGERS, SHOWELL.—Ballade of Judicial Notice, ix. 285; Some recent decisions concerning 'Attempt' and 'Intent,' x. 164.
Rogers on *Elections* (ed. S. H. Day), viii. 260.
Roman Jurisprudence, The Decline of (E. GRUEBER), vii. 70.
Roman Law, Compulsory, in Legal Examinations (*n.*), x. 209.
Roman Law, Possession in (J. M. LIGHTWOOD), iii. 32.
Roman Law, Stoic Terminology in (WOLSELEY EMERTON), iii. 64.
ROSCOE, E. S.—Position and Prospects of the Legal Profession, i. 314.
Roscoe (E. S.).—*Modern Legislation for Seamen*, i. 510; *Pritchard's Admiralty Digest*, iii. 224; *The Bishop of Lincoln's Case*, vi. 221; *A Digest of Cases relating to the Construction of Buildings*, ix. 385.
Roscoe's *Digest of the Law of Evidence* (ed. H. Smith and G. G. Kennedy), vi. 344; (ed. M. Powell), vii. 382.
ROUND, J. H.—The Determination of the Mowbray Abeyance, x. 68.
Round (J. H.).—*Ancient Charters*, v. 434.
Rules of the Supreme Court, The New (THOMAS SNOW), x. 78.
Ruling Cases (ed. R. Campbell; Am. notes by Irving Browne), x. 362.
Rumsey (A.).—*Handbook for Executors and Administrators*, viii. 96; *Handbook of Employers and Employed*, ix. 91.
Russell (F.) and Russell (H.).—*The Power and Duty of an Arbitrator*, viii. 88.
Rylands *v.* Fletcher, The rule in (Sir F. POLLOCK), ii. 52.

Sainctelette (Ch.).—*De la Responsabilité et de la Garantie*, i. 255; *Accidents de travail*, iii. 99.
Saint (H. J. H.).—*Voters and their Registration*, i. 511.
St. Leon (M.).—*See* Pouillet.
Salaman (J. S.).—*The Registration and Protection of Trade Marks*, vii. 289.
Sale of Goods, Bill for codifying the law relating to, iv. 461.
Sale of Goods Act, 1893, The (*n.*), x. 5, 100.
Salkowski (Dr. C.).—*Institutes and History of Roman Private Law* (tr. and ed. by E. E. Whitfield), ii. 262.
SALMOND, JOHN W.—The History of Contract, iii. 166; The Superiority of Written Evidence, vi. 75.
Salmond (John W.).—*Essays in Jurisprudence and Legal History*, viii. 90; *The First Principles of Jurisprudence*, x. 89.
SARGANT, C. H.—The Land Transfer Bill, iii. 272.
Saunders (O. A.).—See *Revised Reports*.
Scenes in Court from the Year Books (E. MANSON), x. 63.
School Board for London, the Theological Circular issued by the (*n.*), x. 112.
SCHOULER, JAMES.—Oral Wills and Death-bed Gifts, ii. 444.
Schouler (James).—*The Law of Bailments*, iv. 217; *The Law of the Domestic Relations*, vi. 103.
SCHUSTER, ERNEST.—Liabilities of Bailees according to German Law, ii. 188; The New German Patent Act, viii. 76.
Schuster (Ernest).—*Die bürgerliche Rechtspflege in England*, iii. 354.
Scotch Law and English Law, Some points of difference between (J. A. LOVAT-FRASER), x. 340.
Scottish Law Review (*n.*), i. 513.
Scribner (C. H.).—*The Law of Dower*, i. 510.
SCRUTTON, T. E.—Roman Law in Bracton, i. 425; Origin of Rights of Common, iii. 373; English Authors and American Copyright, iv. 345.
Scrutton (T. E.).—*Influence of Roman Law on the Law of England*, ii. 96; *Charter-parties and Bills of Lading*, iii. 91; *Land in Fetters*, iii. 95; *Commons and Common Fields*, iv. 91; *The Contract of Affreightment*, vi. 346; *The Law of Copyright*, vii. 88; *The Elements of Mercantile Law*, vii. 287.
Sebastian (L. B.).—*Law of Trade Marks*, i. 123; vi. 457.
Seisin, The Beatitude of (F. W. MAITLAND), iv. 24, 286.
Seisin, The Mystery of (F. W. MAITLAND), ii. 481.

Seisin of Chattels, The (F. W. MAITLAND), i. 324.
Selborne (Earl of).—*A Defence of the Church of England*, iii. 243; *Ancient Facts and Fictions concerning Churches and Tithes*, iv. 477.
Selden Society, The (*n.*), iii. 114; Publications of the (*n.*), iv. 490.
Selim (A.).—*Übersicht der Englischen Rechtspflege vom praktischen und kaufmännischen Standpunkte aus*, ii. 503.
Serafini (E.).—*Della revoca degli atti fraudolenti compiuti dal debitore secondo il diritto romano*, iii. 353; iv. 81.
Serrell (Geo.).—*The Equitable Doctrine of Election*, vii. 189.
Seton (Sir H. W.).—*Forms of Judgments and Orders* (ed. C. C. M. Dale and W. Clowes), viii. 89; ix. 192; x. 95.
Settlement and Removal, The Law of (F. C. MONTAGUE), iv. 40.
SHADWELL, L. L.—Children of Naturalized British Subjects, vi. 67; The Naturalization Act, 1870, s. 7, vii. 80.
Shearman (T. G.) and Redfield (A. A.).—*The Law of Negligence*, v. 85.
Shearwood (J. A.).—*Abridgment of the Law of Real Property*, i. 386; *The Law of Torts*, iii. 99; *Candidates' Guide*, iv. 104.
Sheldon (W. R.).—*See* Dart and Farwell.
Shelford's *Real Property Statutes* (ed. T. H. Carson and H. B. Bompas), ix. 194.
Shelley's Case, The Rule in (*n.*), ii. 115, 290.
SHEPHARD, H. H.—Marriage Law in Malabar, viii. 314.
Shephard (H. H.).—*Commentaries on 'The Transfer of Property Act,'* 1882, iv. 83.
Shipowners, The Liability of, at Common Law (E. L. DE HART), v. 15.
Shirley (W. S.).—*Leading Cases in Common Law*, ii. 511; *Leading Cases in Criminal Law*, iv. 357; and *see* Wigram.
Short (F. H.).—*Crown Office Rules and Forms*, ii. 400.
Short (F. H.) and Mellor (F. H.).—*Crown Office Practice*, vi. 343.
Shortt (J.).—*The Law of Copyright and Libel*, i. 256; *Informations* (*Criminal and Quo Warranto*) *and Mandamus*, iv. 95.
Sichel (W. S.).—*The Practice relating to Witnesses*, iii. 241.
Sidgwick (H.).—*The Elements of Politics*, viii. 84.
Simpson (J. Harvey).—*The Law and Practice of the Court of Record for the Hundred of Salford*, viii. 176.
Sisley (R.).—*A Study of Influenza, &c.*, viii. 176.
Slater (J. H.).—*Law relating to Copyright and Trade Marks*, i. 133.
Smith *v.* Baker and Volenti non fit injuria (THOMAS BEVEN), viii. 202.
Smith (Bovill).—*The Public Health Acts Amendment Act*, 1890, vii. 89.
Smith (George H.).—*Critical History of Modern English Jurisprudence*, x. 99.
Smith (H.).—*The Law of Negligence*, i. 253; and *see* Addison and Roscoe.
Smith (H. A.).—*A Practical Exposition of the Principles of Equity*, iv. 475.
SMITH, J. PARKER, M.P.—Dicey's England's Case against Home Rule, iii. 69.
Smith (John W.).—*Law of Contracts* (ed. V. T. Thompson), i. 249; *Leading Cases* (ed. R. H. Collins and R. G. Arbuthnot), iii. 468.
Smith (Josiah).—*Manual of Common Law* (ed. J. Trustram), iii. 352; *Manual of Equity Jurisprudence* (ed. J. Trustram), v. 434.
Smith (Lumley).—*See* Mayne.
SMITH, P. V.—The Principle of Betterment in its Legal Aspect, x. 117.
Smith (R. J.).—*Yorkshire Registries Act*, 1884, i. 269.
Smith (T. Eustace).—*Inventions and how to patent them*, ii. 266.
Smith (T. E.).—*See* Cutler.
Smith's Mercantile Law (ed. John Macdonell and G. Humphreys), vi. 226, 333.
SNOW, THOMAS.—The Waste of Judicial Power, vii. 256; The Reform of Legal Administration, viii. 129; Special Indorsement or Originating Summons? ix. 31; The New Rules of the Supreme Court, x. 78; and see *Annual Practice* and *Annual* (*Winding Up*) *Practice*.
Sohm (R.).—*The Institutes of Roman Law* (ed. J. C. Ledlie), viii. 257.
Sommaire périodique des Revues de droit, viii. 347.
Späing (W.).—*Comparative Commercial Law*, iv. 86.
Special Indorsement or Originating Summons? (THOMAS SNOW), ix. 31; (R. B. P. CATOR), ix. 238.
Specially Endorsed Writs (C. L. MATHEWS), viii. 320.
Specific Performance and Laesio Fidei (Rt. Hon. Lord Justice FRY), v. 235.
Spencer (Aubrey J.).—*See* Dixon.
Squatter's Case, The (H. W. CHALLIS), v. 185.
Statutes of Limitations and Mortgages (THOMAS MILLIDGE), vii. 43.
Statutes of Practical Utility, The.—*See* Lely.
Statutory Rules and Orders, 1890: *Index to Statutory Rules and Orders*, 1891, viii. 165.
Steer's *Parish Law.*—*See* Macnamara.
STEPHEN, Sir HERBERT.—Homicide by Necessity, i. 51; Evidence in Criminal Cases of similar but unconnected Acts, iv. 71; Murder from the best Motives, v. 188; The New Zealand Poisoning Case (*n.*), iv. 479.
Stephen (Sir H.).—*Law relating to Malicious Prosecution*, iv. 358.
Stephen (H. L.).—*The Law of Support and Subsidence*, vi. 342.
STEPHEN, Sir JAMES FITZJAMES.—Section 17 of the Statute of Frauds redrawn and illustrated, i. 1.
Stephen, Sir James, as a legislator (IN

MEMORIAM), (C. P. ILBERT, C.S.I.), x. 222.
Stephen (Sir J. F.).—*A general view of the Criminal Law of England*, vi. 331; *A Digest of the Law of Evidence*, ix. 292.
Stephen's *Commentaries* (ed. Archibald Brown), ii. 514.
STEPHEN, J. K.—Lawrence on *International Law*, i. 240.
Stephenson (R. M.).—*The Jurist*, iii. 246.
Stewart (C. E.).—*The Law relating to the Sale of Goods*, vii. 91.
Stewart (D.).—*Law of Husband and Wife*, ii. 244.
Stewart (D. Ross).—*The Law of Horses*, viii. 343.
STEWART, W. J.—Summary Jurisdiction, ix. 129.
Stocquart (E.).—*Le statut personnel anglais, &c.*, par A. V. Dicey, iii. 470; *Loi sur le mariage de Belges en pays étranger*, v. 313.
Stokes (Whitley).—*The Anglo-Indian Codes*, iii. 353, 461; v. 83.
Story's *Equity Jurisprudence* (ed. W. E. Grigsby), i. 262; viii. 345.
Strahan (J. A.).—*The Law of the Press*, vii. 279.
Stringer (F. A.).—*Oaths and Affirmations*, vi. 226; and see *Annual Practice*.
Strohal (Dr. E.).—*Succession in den Besitz nach Römischem und heutigem Recht*, ii. 86.
Stroud (F.).—*The Judicial Dictionary*, vi. 344.
Studd (E. F.).—*The Law of Tithes*, v. 211; vii. 386.
Stutfield (H.) and Cautley (H. S.).—*Rules and Usages of the Stock Exchange*, x. 97.
Subjects, Compulsion of, to leave the Realm (W. F. CRAIES), vi. 388.
Summary Jurisdiction (W. J. STEWART), ix. 129.
SWEET, CHARLES.—Trusteeship and Agency, viii. 220; Choses in Action, x. 303.
Swiss Federal Court, The (Rev. W. A. B. COOLIDGE), iv. 409; v. 149.
Switzerland, Public Meetings and Public Order in (K. G. KÖNIG), iv. 169.
Sykes (J. G. W.).—*The Law relating to the Taluqdars of Oudh*, iii. 80.

Talbot (G. J.) and Fort (H.).—*Index of Cases Judicially Noticed*, vii. 285.
Taltarum's Case (F. W. MAITLAND), (*n.*), ix. 1.
Tanon (L.).—*Histoire des tribunaux de l'inquisition en France*, ix. 293.
Tarde (G.).—*La criminalité comparée*, iii. 242; *Les Transformations du Droit*, ix. 286.
Tardif (A.).—*Recueil de textes pour servir à l'enseignement de l'histoire du droit*, iii. 233; *Histoire des sources du droit français*, vi. 346.
Tardif (E. J.).—*Les auteurs présumés du Grand Coutumier de Normandie*, i. 386.
TAYLOR, E. J.—Registration of Deeds under Roman Dutch Law, ii. 347.
Taylor (Hannis).—*The origin and growth of the English Constitution*, vi. 223.
Taylor (Judge Pitt).—*Law of Evidence*, i. 264.
Terry (H. T.).—*Leading Principles of Anglo-American Law*, i. 265.
Testamentary Capacity in Mental Disease (A. WOOD-RENTON), iv. 442.
Text-books, citation of (*n.*), iv. 360.
Theobald (H. S.).—*The Law of Wills*, ii. 105; and *see* Browne.
Thicknesse (R.).—*Law of Husband and Wife*, i. 271.
Thing, What is a? (Sir F. POLLOCK), x. 318.
Thomas (E. C.).—*Leading Cases in Constitutional Law*, i. 371.
Thompson (H.).—See *Annual Digest*.
Thompson (V. T.).—Smith's *Law of Contracts*, i. 249.
THORNHILL, C. E.—Spring and Autumn Assizes, ii. 465; How to Simplify our Titles, v. 11.
Thornton (W. W.).—*The Law of Lost Wills*, vii. 386.
Thring (A. T.).—*The Tithe Act*, 1891, vii. 387.
Through Bills of Lading (H. D. BATESON), v. 424.
Thwaites (C.).—*Guide to Criminal Law*, ii. 258; and *see* Indermaur.
Tillyard (F.).—*Banking and Negotiable Instruments*, viii. 95.
Titles, Charles Butler on the Simplification of, ii. 117.
Titles, How to Simplify our (C. E. THORNHILL), v. 11.
Todd (A. H.).—See *Annual Digest*.
Tönnies (F.).—*See* Hobbes.
Toronto Law School, The (*n.*), ix. 310.
Torts.—*See* Agents, Malice, Chose in Action: (books on), *see* Piggott (F. T.) and Ringwood (R.)
Transvaal, Constitutional Law in the (*n.*), iii. 117.
Trevor (H. E.).—*The Law relating to Railways in British India*, vii. 193.
Trial by Jury in Civil Cases (Judge CHALMERS), vii. 15.
Tripels (G.).—*Les Codes Néerlandais*, iii. 98.
Trustee Act, 1888, The (R. WATSON EVANS), vi. 50.
Trusteeship and Agency (CHARLES SWEET), viii. 220.
Trustram (J.).—*See* Smith (Josiah).
Trusts, Administration of the Law of, by Joint Stock Companies (T. CRISP POOLE), v. 395.
Tudor's *Charitable Trusts* (ed. L. S. Bristowe and W. I. Cook), vi. 339.
Tuke (D. Hack).—*Prichard and Symonds, with chapters on moral insanity*, vii. 386.

Tupper (C. L.).—*Our Indian Protectorate* (Sir A. C. LYALL, K.C.B.), ix. 341.
Turner (E. F.).—*The Duties of Solicitor to Client as to Sales of Land* (ed. W. Llewellyn Hacon), ix. 384.
Turrel (E.).—*Code de commerce italien*, viii. 261.
Twelve Tables of Gortyn, The (H. J. ROBY), ii. 135.
Twiss (Sir Travers).—*Le droit des gens*, iii. 243.
Tyssen (Amherst D.).—*The Law of Charitable Bequests*, v. 200.

UNDERDOWN, E. M., Q.C.—The Copyright Question, ii. 213.
Underhill (A.).—*Concise Guide to Modern Equity*, i. 387.
United States, Public Meetings and Public Order in (Hon. E. H. BENNETT), iv. 257.
United States, The Supreme Court of the (Sir F. POLLOCK), viii. 162.
United States Circuit Courts of Appeals, The (HENRY BUDD), ix. 51.
Use, derivation of (*n.*), iii. 115.
Uses, A Song of (H. W. CHALLIS), vi. 330.

Vagliano's Case (Judge CHALMERS), vii. 216.
Vagliano's Case (J. R. ADAMS), (*n.*), vii. 295.
Vagliano Case in Australia, The (ARTHUR R. BUTTERWORTH), x. 40.
VAIZEY, J. SAVILL.—Remoteness and Perpetuity, vi. 410; Maintenance Clauses, vii. 370.
Vaizey (J. S.).—*The Law of Settlements*, iii. 470; iv. 98; *Precedents and Forms of Settlements*, iv. 476; *The Law relating to the Investment of Trust Money*, vi. 225.
Van Zyl (C. H.).—*Judicial Practice of the Cape of Good Hope*, x. 95.
Vareilles-Sommières (Comte de).—*Les principes fondamentaux du droit*, v. 323.
VERNEY, F. W.—The Maritime Conference at Washington, vi. 320.
Victoria, Draft Code for (*n.*), i. 248.
Villainage in England (C. I. ELTON, Q.C., M.P.), viii. 117.
Villein Tenure, A New Point on (F. W. MAITLAND), vii. 174.
Villetard de Prunières.—*De l'assurance contre les accidents du travail*, viii. 348.
VINOGRADOFF, PAUL.—The Text of Bracton, i. 189; Bracton's Note Book, iv. 436.
Vinogradoff (Paul).—*Uzsledovaniaja po sotsialnoi istorii Anglii v srednie véka*, iii. 352. *See* Villainage in England, KOVALEVSKY (M.).
Viollet (P.).—*Histoire des Institutions politiques et administratives de la France*, vi. 100; *Histoire du droit civil français*, ix. 293.
Vizard (P. E.).—*See* Archibald.
Voigt (M.).—*Die XII Tafeln*, i. 235; *Römische Rechtsgeschichte*, ix. 377.
Volenti non fit injuria and Smith *v.* Baker (THOMAS BEVEN), viii. 202.
Vyse *v.* Foster, The Doctrine of (G. F. HAMILTON), iii. 211.

Wace (H.).—*See* Lee.
Wade (C. G.).—*The Employers' Liability Act of New South Wales*, viii. 347.
Walker (B.).—*Commentaries of Gaius*, ii. 85.
Walker (J. D.).—*Treatise on Banking Law*, i. 507.
Walker (T. A.).—*The Science of International Law*, ix. 383.
Wallach (H.).—*See* Kaufmann.
Wallaschek (R.).—*Studien zur Rechtsphilosophie*, v. 215.
Wallis (J. E.).—*See* Lilly.
Walter of Henley's Husbandry.—*See* Lamond.
Warner (T.).—*Naval Warfare of the Future*, viii. 86.
Warburton (H.).—*Leading Cases in the Criminal Law*, viii. 177.
Washington, The Maritime Conference at, (F. W. VERNEY), vi. 320.
Watson (G.).—*See* Bell's *Law Dictionary*.
Watson (P. B.).—*Marcus Aurelius Antoninus*, i. 120.
Watt (W. A.).—*An Outline of Legal Philosophy*, ix. 293.
Weatherly (F. E.).—*See* Cutler.
Webster (R. G.).—*Law relating to Canals*, i. 382.
WEBSTER, WILLIAM.—Compensation for Misdescription in Sales of Land, iii. 54.
Webster (W. F.).—*The Law relating to Particulars and Conditions of Sale*, v. 323.
Weekly Notes, are they authority? (G. F. HAMILTON), (*n.*), iii. 356.
WESTLAKE, J., Q.C.—Note on Sachs *v.* Sachs, iv. 108.
Westlake (J., Q.C.).—*International Law*, v. 93; *A treatise on Private International Law*, vi. 457.
Westman (Serge de).—Kamarowsky's *Le Tribunal International*, iv. 101.
Wetherfield (G. M. and F.).—*County Court Statutes from* 1846 *to* 1882, ii. 516.
Wharton (F.).—*Digest of United States International Law*, iii. 234; *Law Lexicon* (ed. J. M. Lely), viii. 177.
What is a Thing? (Sir F. POLLOCK), x. 318.
Wheaton (Henry).—*Elements of International Law* (ed. A. C. Boyd), vi. 212.
Wheeler (E. P.).—*The Modern Law of Carriers*, vii. 288.
Wheeler (P. F.).—*Partnership and Companies*, viii. 177; and *see* Chadwyck-Healey.
Whitcombe (J.).—*See* Prideaux.
White (C. A.).—*See* Wilson.
White (F. T.) and Tudor (O. D.).—*Leading Cases in Equity*, ii. 396.
WHITE, J. DUNDAS.—Breach of Promise of Marriage, x. 135.
Whitehead (B.).—*Church Law*, viii. 347.

Wigmore (J. H.).—*The Study of Private Law in Old Japan*, ix. 210.
Wigram (W. Knox).—*Justices' Note-book*, i. 383; iv. 356; viii. 172.
Williams (J.).—*Wills and Intestate Succession*, vii. 285.
Williams (R. V.), Williams (W. V.), and Hansell (E. W.).—*Law and Practice in Bankruptcy*, iii. 97.
WILLIAMS, T. CYPRIAN.—The Terms Real and Personal in English Law, iv. 394; Is a Right of Action in Tort a Chose in Action? x. 143.
Williams (T. Cyprian).—Williams's *Law of Real Property*, i. 387; ix. 93; Williams's *Law of Personal Property*, iii. 465.
Williamson (A. M.).—*Digest of Scottish Conveyancing Cases*, ix. 287.
WILLIAMSON, R. M.—'Actio Personalis moritur cum Persona' in the Law of Scotland, x. 182.
WILLIS, E. COOPER, Q.C.—The Deeds of Arrangement Act, 1887, iv. 426; After-acquired Property in Bankruptcy, x. 240.
Willis (E. Cooper) and Whiteway (A. R.).—*Law and Practice in Bankruptcy*, i. 125.
Willoughby (W. W.).—*The Supreme Court of the United States*, vii. 90.
Wilson (Sir R. K.).—*An Introduction to the Study of Anglo-Muhammadan Law*, x. 355.
Wilson's *Supreme Court of Judicature Acts, Rules and Forms* (ed. C. Burney, M. Muir Mackenzie, and C. Arnold White), ii. 40; iv. 103, 219; v. 94.
WILSON, Sheriff J. DOVE.—Unification of the Law of Bills of Exchange, ii. 297.
Winslow (R.).—*Law of Private Arrangements between Debtors and Creditors*, i. 384; *The Law of Artistic Copyright*, vi. 92.
Winstanley (H.).—See *Annual Practice*.
Winter (A.).—*The New York State Reformatory in Elmira*, vii. 286.
Wood (J. D.).—*The Interpretation of Mercantile Agreements*, iii. 93.
Woodburne (G. B. L.).—*The Bills of Sale Acts*, 1878–82, iii. 87.
Woodfall's *Law of Landlord and Tenant* (ed. J. M. Lely), ii. 264; ix. 289.
Woodfall (R.).—*The New Law and Practice of Railway and Canal Traffic*, v. 321.
WOOD-RENTON (A.).—Moral Mania, iii. 339; Testamentary Capacity in Mental Disease, iv. 442; Patent Right in England and the United States, vii. 150.
WOODRUFF (EDWIN H.).—Chancery in Massachusetts, v. 370.
Woolf (S.) and Middleton (J. W.).—*Law of Compensation for taking or injuriously affecting Land*, i. 263.
Worms (Émile).—*De la Propriété consolidée*, v. 87.
Worms (René).—*De la volonté unilatérale*, ix. 95.
Wright (H.).—*A Handbook to the Office of Magistrate*, v. 214.
WRIGHT, Mr. Justice R. S.—Effect of Mistake on Delivery of Chattels, ii. 313.
Wurtzburg (E. A.).—*Law relating to Building Societies*, ii. 268; x. 93.

Year Books, Scenes in Court from the (E. MANSON), x. 63.
Year Books of the reign of Edward the Third (ed. L. O. Pike), i. 373; iii. 83; v. 82; vi. 218; viii. 85.
Yeatman (Pym).—*Law of Ancient Demesne*, i. 272; *Domesday Book for the County of Derby*, ii. 399; *The Land Transfer Bill*, iii. 353.
Young (G. B.).—*Codification of the Sheriff Court Acts*, ii. 105.
Young (T. C.) and Hislop (R.).—*Lectures on Scots Law*, v. 318.

Zeta, The Case of the (R. G. MARSDEN), x. 113.

TABLE OF CASES,

1885–1894.

[This Table includes only modern cases specially noted or discussed.]

Abd-ul-Messih *v.* Farra, iv. 486.
Abernethy *v.* Hutchinson, iii. 479.
Abrahams *v.* Deakin, vii. 104, 203.
Abrath *v.* N. E. Ry. Co., ii. 527.
Adam *v.* Newbigging, iv. 482.
Addlestone Linoleum Co., *In re* (Benson's Case), iv. 230, 369.
Agency Co. *v.* Short, v. 108, 185.
Ailesbury's (Marquis of) Settled Estates, *Re*, viii. 13.
Alcock *v.* Smith, vii. 308; viii. 103, 112.
Alderton *v.* Archer, i. 279.
Alexander *v.* Jenkins, viii. 188.
Allbutt *v.* The General Council of Medical Education, vi. 119.
Allcard *v.* Skinner, iv. 113, 117.
Allcock *v.* Hall, vii. 209.
Allison *v.* Frisby, *Re* Frisby, vi. 235.
Almada & Tirito Co., *In re* (Allen's Case), iv. 369.
Alston, In the Goods of, viii. 266.
American Braided Wire Co. *v.* Thomson, vi. 464.
American Must Co. *v.* Hendry, x. 104.
Angus *v.* Clifford, vii. 309.
Aplin *v.* Porritt, ix. 306.
Apollinaris Co.'s Trade Marks, *Re*, vii. 214, 300.
Appleby *v.* Franklin, ii. 289.
Arbenz' application, *In re*, iii. 489.
Arbib & Class's Contract, *Re*, vii. 212.
Archer's Case, viii. 187.
Armstrong, *In re*, iv. 484.
Armstrong, *Re*, *Ex parte* Gilchrist, ii. 530.
Armstrong *v.* Milburn, ii. 412.
Arnison *v.* Smith, v. 337.
Arrow Steamship Co. *v.* Tyne Commissioners, x. 293.
Artola Hermanos, *Re*, vi. 356.
Asher *v.* Calcraft, iii. 362.
Atkins *v.* Shephard, *Re* Shephard, vi. 236.
Atkinson *v.* Bradford Building Society, vi. 463.
Att.-Gen. *v.* Bradlaugh, i. 391.
Att.-Gen. *v.* Chapman, viii. 11.
Att.-Gen. *v.* Logan, vii. 305.
Att.-Gen. *v.* Smith, viii. 278; ix. 103.
Att.-Gen. for Quebec *v.* Reed, i. 278.
Att.-Gen. of Duchy of Lancaster *v.* Duke of Devonshire, i. 281.
August, The, viii. 9.
Austerberry *v.* Corporation of Oldham, i. 516.
Australian Newspaper Co. *v.* Bennett, x. 294.
Australian Wine Importers, *In re*, v. 448.
Avis *v.* Newman, *In re* Cartwright, v. 448.

Bacheldor *v.* Yates, *In re* Yates, iv. 370.
Baddeley *v.* Earl Granville, iv. 119.
Badeley *v.* Consolidated Bank, iv. 482.
Badische Anilin u. Soda Fabrik *v.* Schott, ix. 14.
Baggs, *Re*, x. 300.
Bahama Islands Case, ix. 200.
Baird *v.* Wells, vi. 470.
Bakewell *v.* Davis, x. 112.
Balim *v.* Hughes, ii. 412.
Balkis *v.* Consolidated Co., x. 106.
Ballard *v.* Tomlinson, i. 392.
Bank of New South Wales *v.* O'Connor, vi. 353.
Barber, *Re*, Burgess *v.* Vinnicome, ii. 414.
Barber *v.* Penley, ix. 303.
Barclay *v.* Pearson, ix. 107, 201.
Barker *v.* Fleetwood Improvement Commissioners, vi. 468.
Barnardo *v.* Ford, ix. 8.
Barnardo *v.* McHugh, viii. 15.
Barnett *v.* King, vii. 109.
Batcheldor *v.* Yates, *In re* Yates, iv. 370.
Bates *v.* Bates, v. 226.
Batthyany *v.* Walford, iv. 118.
Bawden *v.* London Assurance Co., ix. 11.
Beardmore, *Ex parte*, *Re* Clark, x. 297.
Beasley *v.* Roney, vii. 206.
Beck *v.* Pierce, v. 451.
Beckett *v.* Ramsdale, *Re* Hodgson, ii. 282.
Beckett *v.* Tasker, iii. 481.
Beckett *v.* Tower Assets Co., vii. 208.
Bedford *v.* Teal, vii. 10.

Bell *v.* Antwerp Line, vii. 101.
Bellamy *v.* Debenham, vii. 10.
Bell Cox *v.* Hakes, vii. 8.
Bellencontre, *Re*, vii. 298.
Bennett *v.* Bennett, *Re* Fish, ix. 301.
Benson's Case (*In re* Addlestone Linoleum Co.), iv. 230.
Bentinck *v.* Fenn (*In re* Cape Breton Co.), iv. 235.
Bentinck *v.* London Joint Stock Bank, ix. 204.
Bernina, The (Mills *v.* Armstrong), ii. 416; iii. 248, 250; iv. 235, 363; v. 335.
Bernstein *v.* Bernstein, x. 14.
Betts, *In re*, iii. 482.
Betts *v.* Armstead, v. 104.
Beyts and Craig, *Re*, x. 207.
Bidder *v.* Bridges, i. 393; iv. 368.
Binnie *v.* Broom, vi. 123.
Binstead, *Re*, *Ex parte* Dale, ix. 110.
Birch *v.* Cropper, *Re* Bridgewater Nav. Co., vi. 123.
Bird, *Re*, Bird *v.* Cross, x. 301.
Birkin *v.* Wing, vii. 7.
Bishop *v.* The Balkis, &c. Co., vii. 5, 105.
Blackburn, Low & Co. *v.* Vigors, ii. 531; iii. 106; iv. 117.
Blackman *v.* Fysh, vii. 306.
Bland *v.* Low, *Re* Low, x. 104.
Blyth *v.* Fladgate, vii. 212.
Board of Trade *v.* Block, v. 107.
Boden *v.* Roscoe, x. 204.
Boehm's Will, *Re*, vii. 211.
Bolton, *Re*, Brown *v.* Bolton, ii. 408.
Bolton *v.* Bolton, viii. 12.
Bolton *v.* Lambert, v. 440.
Bonaparte *v.* Bonaparte, ix. 108.
Bond *v.* Plumb, x. 109.
Bonnard *v.* Perryman, vii. 300.
Bonner *v.* Lyon, vi. 355.
Boston Deep Sea Fishing Co. *v.* Ansell, v. 107.
Bourgoise, *In re*, iv. 226; v. 438.
Bowen *v.* Anderson, x. 108, 109.
Bowers *v.* Harding, vii. 204.
Bowes *v.* Press, x. 103.
Brall, *Re*, x. 15.
Braunstein *v.* Lewis, viii. 12.
Brawn, *Ex parte*, *Re* Hastings, ix. 19.
Bray *v.* Justices of Lancashire, v. 333, 337.
Brewer *v.* Brown, i. 282.
Bridger, *Re*, ix. 110.
Bridger, *Re*, Brompton Hospital for Consumption *v.* Lewis, x. 105.
Bridger *v.* Savage, v. 331.
Bridgewater Navigation Co., *Re* Birch *v.* Cropper, vi. 123.
Brinkley *v.* Att.-Gen., vi. 356.
Brisbane Municipal Council *v.* Martin, x. 290.
Bristol and West of England Bank *v.* M. Ry. Co., viii. 8.
Bristol Athenæum, *Re*, vi. 237.
Bristol Bread Co. *v.* Maggs, vi. 355; vii. 10.
British and American Trustee Corporation *v.* Cowper, x. 206, 293.
British South African Co. *v.* Companhia de Moçambique, ix. 297; x. 108.
British Tanning Co. *v.* Groth, vii. 214.
Brocklesby *v.* Temperance Permanent Building Society, x. 8.
Brockwell *v.* Bullock, v. 337.
Brogden, *In re*, Billing *v.* Brogden, v. 105.
Brompton Hospital for Consumption *v.* Lewis, *Re* Bridger, x. 105.
Brown *v.* Bolton, *Re* Bolton, ii. 408.
Brown *v.* Burdett, v. 226.
Brown's Estate, *Re*, ix. 304.
Brunsden *v.* Humphrey, i. 280.
Bryant and Barningham's Contract, *Re*, vi. 354.
Bryant *v.* La Banque du Peuple, ix. 297.
Buck *v.* Mayew, ix. 14.
Buckley *v.* Hull Docks Co., ix. 307.
Buckmaster *v.* Buckmaster, iii. 364.
Budgett, *Re*, x. 297.
Bunch *v.* G. W. Ry. Co., ii. 530.
Burdett, *In re*, *Ex parte* Byrne, iv. 370.
Burgess *v.* Vinnicome, *Re* Barber, ii. 414.
Burkill *v.* Thomas, viii. 107.
Burnley Equitable Society *v.* Casson, vii. 102.
Burt *v.* Gray, vii. 302.
Bute's (Marquis of) Case, viii. 187.
Butler *v.* Manchester, Sheffield, and Lincolnshire Ry. Co., v. 99.
Byram *v.* Jull, *Re* Dixon, vi. 234.
Byrne, *Ex parte*, *In re* Burdett, iv. 370.

Caird *v.* Moss, iii. 109.
Caird *v.* Sime, ii. 109; iii. 360, 477.
Callender *v.* The Colonial Secretary of Lagos, viii. 10.
Calliope, The, vi. 112; vii. 97.
Cambefort *v.* Chapman, iii. 483.
Cameron *v.* Wells, *In re*, iv. 236.
Cammell's Case, x. 205.
Cann *v.* Willson, v. 101; vii. 106.
Canning *v.* Farquhar, ii. 417.
Cape Breton Co., *In re* (Bentinck *v.* Fenn), iv. 235.
Carlill *v.* The Carbolic Smoke Ball Co., viii. 268; ix. 102.
Cartwright, *In re*, Avis *v.* Newman, v. 448.
Castioni, *Re*, vii. 1, 102.
Cate *v.* Devon Newspaper Co., v. 340.
Cawley & Co., *Re*, vi. 118.
Cawse *v.* The Nottingham Hospital, vii. 204.
Chaffers *v.* Goldsmid, x. 110.
Chalbury *v.* Moore, ix. 20.
Chamberlain *v.* Young, ix. 301.
Chapman *v.* Guardians of Auckland Union, v. 450.
Chappell, *Re*, *Ex parte* Ford, ii. 415.
Charlwood, *Re*, x. 207.
Charrington, *Ex parte*, *In re* Dickinson, v. 224.
Chatenay *v.* The Brazilian Submarine Telegraph Co., vii. 100.
Chicago &c. *v.* Ross, i. 283.
Chishima-Ravenna case, x. 198.
Chisholm *v.* Doulton, v. 332, 444.
Christchurch Inclosure Act, *In re*, iv. 482.
Chudley *v.* Chudley, x. 13.

Claridge *v.* South Staffordshire Tramway Co., viii. 192.
Clark, *Re, Ex parte* Beardmore, x. 297.
Clark *v.* Clark, ii. 118.
Clarke, *In re,* Coombe *v.* Carter, iv. 118.
Clarke *v.* Cartin Coal Co., viii. 15.
Clarke *v.* Millwall Dock Co., ii. 533.
Cleary *v.* Booth, ix. 208.
Cleaver, *Re,* ii. 536.
Cleaver *v.* Mutual Reserve Fund Life Association, vii. 307; viii. 110.
Clegg *v.* Hands, vi. 354.
Clémence, *Ex parte, Re* Carriage Co-operative Supply Association, iii. 112.
Clements *v.* L. & N. W. Ry. Co. x. 297.
Clerical, &c., Life Assurance Society *v.* Carter, v. 333.
Cloak *v.* Hammond, iii. 253.
Coaks *v.* Boswell, ii. 535.
Coatsworth *v.* Johnson, ii. 532.
Cochrane *v.* Moore, vi. 351, 446, 459.
Cohen *v.* Kittell, v. 331.
Collard *v.* Marshall, viii. 190.
Collen *v.* Wright, iii. 251.
Collins, *Ex parte, Re* Yarrow, vi. 232.
Collins *v.* Elstone, ix. 109.
Colonial Bank *v.* Cady & Williams, vi. 460, 466.
Colonial Bank *v.* Whinney, ii. 532.
Colquhoun *v.* Brooks, iv. 111, 487; vi. 122.
Colquhoun *v.* Heddon, vi. 461.
Combined Weighing Machine Co., *Re,* vi. 237.
Commissioners of Income Tax *v.* Pemsel, viii. 5.
Commissioners of Inland Revenue *v.* Forrest, vi. 463.
Commissioner of Stamps of N. S. Wales *v.* Hope, vii. 308.
Commonwealth *v.* Pierce, i. 284.
Companhia de Moçambique *v.* British South Africa Co., viii. 359; ix. 11.
Concha *v.* Concha, iii. 107.
Concha *v.* Murrieta, v. 334.
Consolidated Bank *v.* Curtis, viii. 114, 183, 280.
Conybeare *v.* The London School Board, vii. 102.
Cooke *v.* Eshelby, iii. 358.
Cooke *v.* Smith, vi. 465.
Coombe *v.* Carter, *In re* Clarke, iv. 118.
Coombs *v.* Wilkes, viii. 11.
Cooper *v.* Cooper, iv. 364.
Cooper *v.* Crane, viii. 13.
Cooper *v.* Straker, v. 338.
Corn *v.* Matthews, ix. 103.
Cornish *v.* Accident Insurance Co., vi. 115.
Coupé Co. *v.* Maddick, viii. 109.
Coventry's Case, vii. 104.
Cowan *v.* O'Connor, iv. 368.
Cowper Essex *v.* Local Board for Acton, v. 447.
Cox *v.* Neave's Contract, *Re,* vii. 212.
Craignish *v.* Hewitt, ix. 104.
Crampton *v.* Ridley & Co., iv. 234.
Crawford *v.* Newton, iv. 115; vi. 353.
Crears *v.* Hunter, iii. 484.
Criterion Gold Mining Co., *In re,* v. 337.
Croft *v.* King, ix. 296.
Cross *v.* Fisher, viii. 183.
Cunningham, *Ex parte,* i. 135.
Curran *v.* Treleaven, viii. 7.
Cutler *v.* North London Ry. Co., iii. 482.

Dale, *Ex parte, Re* Binstead, ix. 110.
Daly *v.* D. W. & W. Ry. Co., ix. 19.
Dangar's Trusts, *In re,* v. 445.
Daniel *v.* Ferguson, vii. 210.
Darley Main Colliery Co. *v.* Mitchell, ii. 417, 418.
Dashwood *v.* Magniac, viii. 8.
Davies, *In re,* iv. 488.
Davies *v.* Davies, iv. 118, 240.
Davies *v.* Makuna, iii. 480.
Davis *v.* Davis, x. 111.
Davy, *Re,* ix. 11.
Dean *v.* Dean, vii. 302.
De Francesco *v.* Barnum, vi. 240; vii. 3.
De Mora *v.* Concha, ii. 406.
De Ricci *v.* De Ricci, viii. 10.
Derry *v.* Peek, vi. 112; vii. 106.
De Sousa *v.* British South Africa Co., viii. 101, 359.
D'Etchegoyen *v.* D'Etchegoyen, iv. 485.
Devonshire (D. of) *v.* Pattinson, iv. 238.
Dickinson, *In re, Ex parte* Charrington, v. 224.
Dickson *v.* G. N. Ry. Co., iii. 250.
Diggles, *In re,* Gregory *v.* Edmondson, v. 107.
Dillon, *Re,* vi. 351.
Dillon *v.* Corporation of Haverfordwest, vii. 203.
Dixon, *Re,* Byram *v.* Jull, vi. 234.
Dobson *v.* Festi, vii. 297.
Dowdy, *Re,* ix. 12.
Downs *v.* Salmon, iv. 370.
Dowse *v.* Gorton, vii. 303.
Draycott *v.* Harrison, ii. 527.
Driver *v.* Broad, ix. 206.
Drummond *v.* Van Ingen, iv. 113.
Duck *v.* Bates, i. 135.
Duncan *v.* Dixon, vi. 350.
Duncan *v.* Lawson, v. 442.
Dunn's Trade Marks, *In re,* v. 448.
Durham *v.* Durham, i. 390.
Dyson *v.* Mason, v. 220.

East London Waterworks Co. *v.* Kellerman, viii. 281.
Easton *v.* London Joint Stock Bank, iii. 254; iv. 235, 482.
Ebsworth and Tidy's Contract, *Re,* vi. 116.
Eddowes *v.* Argentine Loan Agency, vi. 466.
Eddystone Marine Insurance Co., *Re,* x. 10, 104.
Edmonds *v.* Robinson, i. 393.
Edmunds *v.* Wallingford, i. 392.
Edwards, *Re,* viii. 112.
Edwards *v.* Carter, x. 7.
Elkington *v.* Hürter, viii. 280.
Elliott *v.* Hall, i. 516.
Ellis *v.* Goulton, ix. 104.

Ellis *v.* Johnson, *Re* Glanvill, ii. 411.
Elwes *v.* Brigg Gas Co., iii. 108.
Emmens *v.* Pottle, ii. 287.
Eno *v.* Dunn, vi. 463.
Etherley *v.* Auckland District Board, x. 105.
Evans *v.* Evans, viii. 273; ix. 2.
Evans *v.* Hoare, viii. 185.
Evelyn, *Re*, x. 205.
Everley, In the Goods of, viii. 115.
Ewing *v.* Orr Ewing, ii. 111.

Falcke *v.* Scottish Imperial Assurance Co., iii. 254.
Farquharson *v.* Morgan, x. 199.
Farrar *v.* Farrars, v. 25.
Faure Electric Accumulator Co., *In re*, v. 222.
Fawcett *v.* Holmes, *Re*, vi. 115.
Fearon *v.* Aylesford, i. 392.
Field *v.* Field, v. 224; vi. 234.
Filburn *v.* People's Palace Co., vi. 471.
Fine Art Society *v.* Union Bank of London, iii. 113.
Finlay *v.* Chirney, iv. 364.
Firbank *v.* Humphreys, iii. 251.
Fish, *Re*, Bennett *v.* Bennett, ix. 301.
Fishburn *v.* Hollingshead, vii. 301; viii. 1.
Fisher *v.* Shirley, vi. 235.
Fitzgerald's Trustees *v.* Mellersh, viii. 189.
Fletcher *v.* L. & N. W. Ry. Co., viii. 104.
Flower *v.* L. & N. W. Ry. Co., x. 202.
Foakes *v.* Beer, i. 134.
Ford, *Ex parte*, *Re* Chappell, ii. 415.
Ford *v.* Wiley, 335, 443.
Foreman, *Ex parte*, iii. 361.
Forsyth *v.* Forsyth, viii. 10.
Foster *v.* Reeves, viii. 275.
Foster *v.* Tyne Pontoon, &c. Co., x. 105.
Fraternity of Free Fishermen, The, iv. 118.
Frayling & Cunningham's Contract, *Re*, vii. 306.
Frisby, *Re*, Allison *v.* Frisby, vi. 235.
Frost *v.* Frost, vi. 232.
Fry *v.* Lane, v. 225.
Fry *v.* Moore, vi. 120.

Gandy *v.* Gandy, ii. 118.
Gardiner, *In re*, iv. 234.
Gardner, *Re*, ix. 103.
Gardner *v.* Mansbridge, iii. 483.
Garnett, *In re*, Robinson *v.* Gandy, iii. 111.
Garston (sailing ship) Co. *v.* Hickie Borman & Co., iii. 473.
Gaslight & Coke Co. *v.* Hardy, iii. 114.
Gaslight & Coke Co. *v.* Vestry of St. Mary Abbotts, Kensington, i. 516.
Gasquoine, *Re*, x. 201.
Gaze, *Ex parte*, *In re* Lane, v. 448.
Gerard's (Lord) Settled Estate, *Re*, x. 14.
Gibbs *v.* Messer, vii. 299.
Gibbs *v.* Société Industrielle, vi. 461.
Gibson *v.* Lawson, viii. 7.
Gilchrist, *Ex parte*, iii. 105.
Gilchrist, *Ex parte*, *Re* Armstrong, ii. 530.
Giles *v.* Walker, vi. 465.
Gillespie, *Re*, ii. 417.
Ginnett *v.* Whittingham, ii. 409.
Glanvill, *Re*, Ellis *v.* Johnson, ii. 411.
Glasgow (Lord Provost of) *v.* Farie, v. 338.
Glasier *v.* Rolls, vi. 112.
Gordon *v.* Silber, vii. 4.
Gorton, *In re*, v. 339.
Goulder *v.* Goulder, viii. 268.
Grange *v.* Sturdy, *Re* Haseldine, ii. 407.
Grant *v.* Anderson, viii. 106.
Gray *v.* Smith, vi. 240.
G. W. Ry. Co. *v.* Bunch, iv. 235, 263.
G. W. Ry. Co. *v.* McCarthy, iii. 251.
Green *v.* Green, ix. 296.
Green *v.* Paterson, ii. 534.
Greenwood *v.* Sutcliffe, viii. 189.
Gregory *v.* Edmondson, *In re* Diggles, v. 107.
Gresham Life Assurance Co. *v.* Styles, vi. 357, 461; ix. 9.
Grey's Trusts, *Re*, ix. 18.
Griffiths *v.* Hughes, viii. 275.
Grove, *In re*, v. 332.

Haigh *v.* West, ix. 300.
Halifax Joint Stock Banking Co. *v.* Gledhill, vii. 108.
Hall *v.* Ewin, iv. 119.
Hall *v.* Hall, viii. 191.
Hamilton *v.* Hamilton, viii. 181.
Hamilton *v.* Pandorf, iii. 472.
Hamilton *v.* Thames Marine Ins. Co., ii. 532.
Hamlyn *v.* Crown Accidental Insurance Co., ix. 202.
Hamlyn *v.* Talisker Distillery, x. 290.
Hamlyn & Co. *v.* Wood & Co., vii. 312.
Hammond *v.* Bussey, iv. 234.
Hammond *v.* Schofield, vii. 205.
Hanbury *v.* Hanbury, viii. 272.
Hands *v.* Andrews, ix. 203.
Hanfstaengl *v.* Empire Palace, x. 198, 295.
Hardinge *v.* Cobden, *Re* Earl of Lucan, vii. 103.
Hardy *v.* Fothergill, v. 107.
Hargreave *v.* Spink, viii. 105.
Harris, *In re*, iii. 486.
Harris *v.* Beauchamp Bros., x. 199.
Harris *v.* Brisco, iii. 104.
Harris *v.* Knight, vii. 5.
Harris *v.* Rothwell, iii. 485.
Harris *v.* Tubb, vi. 116.
Harrison *v.* Harrison, *In re* Little, v. 336.
Harrison *v.* Southwark Water Co., vii. 305.
Harvey *v.* Gillow, ix. 205.
Haseldine, *Re*, Grange *v.* Sturdy, ii. 407.
Hastie's Trusts, *In re*, iii. 487.
Hastings, *Re*, *Ex parte* Brawn, ix. 19.
Hastings' Estate, *Re* Lady, iii. 255, 365.
Hastings *v.* Pearson, ix. 108.
Hatchard *v.* Mège, iii. 485.
Hawken *v.* Shearer, iv. 114.
Hawkins, *Re*, *Ex parte* Hawkins, x. 106.
Hayward *v.* Hayward, iii. 253.
Hearson *v.* Churchill, viii. 272.
Hebblethwaite *v.* Peever, viii. 105.
Hebditch *v.* MacIlwaine, x. 200, 294.
Hedley *v.* Pinkney & Sons S. S. Co., viii. 109.
Helby *v.* Matthews, x. 296.
Helmore *v.* Smith, iii. 488.

Henderson *v.* Preston, v. 101.
Hennessy *v.* Wright, v. 104.
Henthorn *v.* Fraser, viii. 185, 265.
Herman *v.* Jeuchner, ii. 113.
Hersant *v.* Blaine, iv. 115.
Hesketh *v.* Bray, iv. 366.
Hewett *v.* Thompson, vi. 117.
Hick *v.* Raymond, ix. 102.
Hick *v.* Rodocanachi, viii. 9.
Hiddingh *v.* De Villiers, iv. 239.
Hill *v.* Cooper, ix. 298.
Hill *v.* Thomas, x. 9.
Hoare *v.* Niblett, vii. 206.
Hodgson, *Re*, Beckett *v.* Ramsdale, ii. 282.
Hodkinson *v.* N. W. Railway Co., i. 281.
Holford, *Re*, x. 299.
Hollingshead, *In re*, iv. 367.
Holmes *v.* Millage, ix. 203.
Hope *v.* Hope, viii. 280.
Hopkins, *Ex parte*, viii. 188.
Hornsey Local Board *v.* Monarch Building Society, vi. 237.
Howard *v.* Clarke, iv. 365.
Howard *v.* Refuge Friendly Society, ii. 535.
Howarth *v.* Brearley, iii. 479.
Hoyle, *Re*, ix. 101.
Hulkes, *In re*, Powell *v.* Hulkes, iii. 108.
Hull (Mayor of) *v.* Harding, ix. 15.
Huntington *v.* Attrill, viii. 103; ix. 295.
Hyde *v.* Hyde, v. 226.

Imperial Loan Co. *v.* Stone, viii. 185.
Industrie, The, x. 102.
Ingham *v.* Sachs, iv. 109.
Innes *v.* Newman, x. 300.
Institution of Civil Engineers, *In re*, iv. 366.
Irish, *In re*, v. 224.
Isaacs' Case, viii. 280.
Isitt *v.* Railway Passengers Assurance Co., v. 333.

Jackson *v.* Barry Ry. Co., ix. 109.
Jackson *v.* Northampton Street Tramways Co., iii. 109.
Jago *v.* Jago, ix. 305.
James *v.* Jones, x. 112.
James *v.* Smith, vii. 213.
Jay *v.* Johnstone, ix. 106.
Jay *v.* Robinson, vii. 4.
Jenkins *v.* Bushby, vii. 209.
Jenkins *v.* Jackson, v. 223.
Jenkinson *v.* Brandley Mining Co., iv. 116.
Jenoure *v.* Delmege, vii. 110.
Jersey (Lord) *v.* Uxbridge Sanitary Authority, viii. 17.
Jex *v.* McKinney, v. 443.
Johannesburg, *Re*, vii. 104.
Johnson, *In re*, iv. 115.
Johnson *v.* Lindsay & Co., vi. 121; viii. 4, 114.
Johnson *v.* Mayor of Croydon, ii. 416.
Johnston *v.* Marks, iii. 485; iv. 112.
Johnstone *v.* Milling, ii. 285.
Jones's Case, Reg. *v.* Barnard, vii. 103.
Jones *v.* Harding, iv. 371.
Jones *v.* The Merioneth Building Society, vii. 310.
Jones *v.* Merionethshire Building Society, viii. 14, 113.
Jones *v.* Padgett, vi. 467.
Jones *v.* Scottish Accident Co., ii. 526.
Jones *v.* Watts, vi. 354.
Jupp, *In re*, Jupp *v.* Buckwell, iv. 485.

Karberg's Case, ix. 12.
Kaye *v.* Sutherland, iv. 233.
Kearley *v.* Thomson, vi. 356.
Keen *v.* Henry, x. 111.
Kellard *v.* Rooke, v. 100.
Keyse *v.* Keyse, ii. 533.
Kilpin *v.* Ratley, viii. 281.
King *v.* Dickeson, v. 339.
Kinnaird *v.* Trollope, v. 225.
Kirk & Randall *v.* E. & W. India Dock Co., iii. 110.
Knight *v.* Lee, ix. 108.
Knox, *Re*, vi. 239.

Ladywell Mining Co. *v.* Brookes, iii. 488.
Lamb, *Re*, vi. 119.
Lamb *v.* Evans, ix. 108.
Lambert, *In re*, Stanton *v.* Lambert, v. 106.
Lancashire & Yorkshire Ry. Co. *v.* Greenwood, v. 100.
Lane, *In re*, *Ex parte* Gaze, v. 448.
Last *v.* London Ass. Corporation, i. 279; ii. 112.
Lavery *v.* Pursell, iv. 490; v. 107.
Lawrence *v.* Newberry, vii. 304.
Leader *v.* Duffey, iv. 488.
Leak *v.* Driffield, vi. 234, 355.
Learoyd *v.* Whiteley, iv. 236.
Leather Manufacturing Bank *v.* Morgan, ii. 407.
Lee *v.* Abdy, ii. 529; iii. 101.
Lee *v.* Butler, x. 10.
Lee *v.* Neuchatel Asphalte Co., v. 221.
Lee *v.* Turner, iv. 370.
Leeds Estate Building Co. *v.* Shepherd, iv. 235.
Leigh *v.* Leigh, v. 225.
Le Lievre *v.* Gould, ix. 202.
Lester, *Ex parte*, *Re* Lynes, ix. 299.
Levasseur *v.* Mason & Barry, vii. 305.
Lewis, *Ex parte*, iv. 483.
Lewis *v.* Fermor, iii. 363.
Lewis *v.* Owen, x. 104.
Lewis *v.* Ramsdale, iii. 111.
Licensed Victuallers' Association, *Re*, vi. 117.
Licensed Victuallers' Newspaper Co. *v.* Bingham, iv. 372.
Lickorish, *Ex parte*, vi. 353.
Lister *v.* Lane, ix. 301.
Lister *v.* Stubbs, vi. 469.
Little, *In re*, Harrison *v.* Harrison, v. 336.
Liverpool Household Stores Association *v.* Smith, iv. 483.
London & Westminster Loan Co. *v.* L. & N. W. Ry. Co., ix. 307.
London Bank of Mexico *v.* Apthorpe, vii. 313.
L. B. & S. C. Ry. Co. *v.* Truman, ii. 285.

London Joint Stock Bank *v.* Simmons, viii. 267; ix. 5, 204.
London School Board *v.* Wood, ii. 115.
London, Tilbury, &c. Ry. Co. Case, *Re*, vi. 237.
Long *v.* Clarke, x. 104.
Lound *v.* Grimwade, v. 107.
Low, *Re*, Bland *v.* Low, x. 104.
Low *v.* Bouverie, viii. 7.
Lowe *v.* Dixon, ii. 413.
Lowe *v.* G. N. Ry. Co. x. 6.
Lucan, Earl of, *Re*, Hardinge *v.* Cobden, vii. 103.
Lucas, *Re*, Parish *v.* Hudson, ii. 287.
Lucas *v.* Dixon, v. 220.
Lucas *v.* Harris, iii. 254.
Luxon & Co., *Re*, viii. 176.
Lydney & Wigpool Iron Ore Co. *v.* Bird, iii. 110.
Lyell *v.* Kennedy, vi. 123.
Lynes, *Re*, *Ex parte* Lester, ix. 299.
Lysaght *v.* Clark, vii. 201.

Macartney *v.* Garbert, vi. 356.
McClatchie *v.* Haslam, viii. 113.
Macdougall *v.* Knight, iii. 106; v. 443; vi. 470.
McGregor *v.* McGregor, iv. 366; v. 106.
McManus *v.* Cooke, iv. 115.
Macreight, *Re*, ii. 116.
Madell *v.* Thomas, vii. 208.
Mainland *v.* Upjohn, v. 444.
Manchester Banking Co. *v.* Parkinson, v. 224.
Manchester (Mayor of) *v.* Williams, vii. 102.
Manchester S. & L. Ry. Co. *v.* North Central Wagon Co., v. 106.
Mander *v.* Falcke, viii. 17.
Marchant, In the Goods of, x. 13.
Martin *v.* Rocke, ii. 413.
Masefield *v.* Rotana, viii. 281.
Mathews *v.* London Street Tramways Co., v. 335.
Matthews *v.* Munster, iv. 234.
Maxim-Nordenfelt Co. *v.* Nordenfelt, ix. 201.
Mayor *v.* Collins, vi. 351.
Mayor of London, *Ex parte*, iii. 361.
Membery *v.* G. W. Ry. Co., v. 445.
Menzies, *Ex parte*, *Re* New Eberhardt Co., vi. 232.
Merivale *v.* Carson, iv. 240.
Merryweather *v.* Moore, ix. 20.
Metropolitan Bank *v.* Pooley, i. 394.
Metropolitan Music Hall *v.* Lake, v. 446.
Metropolitan Railway Co. *v.* Wright, ii. 530.
Meux *v.* Cobley, viii. 279.
Meyer *v.* Decroix, viii. 111.
Micklethwait *v.* Newlay Bridge Co., iii. 111.
Midgley *v.* Midgley, x. 14.
Midland Ry. Co. *v.* Martin, ix. 307.
Midland Ry. Co. *v.* Miles, iii. 109.
Mighell *v.* Sultan of Johore, x. 101, 294.
Miles *v.* N. Z. Alford Estate Co., ii. 533.
Millar *v.* Toulmin, iii. 110.
Miller *v.* Hancock, ix. 308.
Mills *v.* Armstrong (The *Bernina*), ii. 416; iii. 248, 250; iv. 235, 363; v. 335.
Mills *v.* Dunham, vii. 203.
Milne *v.* Smith, ix. 209.
Milner, *Ex parte*, ii. 114.
Milner's Settlement, *Re*, viii. 13.
Milward *v.* Midland Railway Co., i. 282.
Missouri Steamship Co., *In re*, iv. 489; v. 446; vi. 122, 230.
Mitchell *v.* Darley Main Colliery Co., i. 280.
Mitchell *v.* Mitchell, viii. 12.
Mitchell *v.* Simpson, vi. 121.
Mogul Steamship Co. *v.* McGregor, Gow & Co., v. 104, 447; vi. 113; viii. 101.
Monetary Advance Co. *v.* Cater, iv. 370.
Montana, The, v. 327.
Montgomery *v.* Thompson, vii. 299, 300.
Moorcock, The, v. 102, 334; vi. 112; vii. 97.
Moore *v.* Knight, vii. 211.
Moore *v.* Lambeth Waterworks Co., ii. 415.
Morgan *v.* London General Omnibus Co., i. 135.
Morley *v.* Loughman, ix. 205.
Morris *v.* Edwards, vii. 9.
Morritt, *In re*, iii. 253.
Moul *v.* Groenings, viii. 1.
Municipal Permanent Investment Buildin Society *v.* Kent, iii. 113.
Musgrove *v.* Chun Teeong Toy, vii. 299.
Musther, *Re*, vi. 352.
Musurus Bey *v.* Gadban, x. 203, 295.
Mutton, *In re*, iii. 482.

National Building Society *v.* Raper, viii. 189.
National Debenture Corporation, *Re*, vii. 208.
National Telephone Co. *v.* Baker, ix. 206.
Neilson *v.* Morsend Iron Co., ii. 526.
Newbigging *v.* Adam, iv. 481.
Newen, *Re*, x. 299.
New Eberhardt Co., *Re*, *Ex parte* Menzies, vi. 232.
New Land Development Association, *Re*, viii. 275.
Newlove *v.* Shrewsbury, v. 106.
Newman *v.* Pinto, iv. 113.
New University Club, *In re*, iii. 359.
N. Z. Loan and Agency Co. *v.* Corporation of Wellington, x. 208.
Nicol *v.* Nicol, ii. 410.
Norrington *v.* Wright, ii. 280.
North Central Wagon Co. *v.* Manchester S. & L. Ry. Co., vii. 207.
Northumberland (D. of) *v.* Bowman, iv. 117.
North-West Transportation Co. *v.* Beatty, iv. 235.
Norton *v.* Turville, iii. 255.
Nottingham Brick Co. *v.* Butler, ii. 414.
Nouvion *v.* Freeman, iii. 484; iv. 230; vi. 238.
Nunneley *v.* Nunneley, vii. 6.
Nuttall *v.* Hargreaves, viii. 112.
Nutton *v.* Wilson, v. 333.

Nyberg *v.* Handelaar, viii. 278.
Nystrom *v.* Cameron, viii. 115.

Oakey *v.* Dalton, iii. 486.
Oliver *v.* Hunting, vi. 355.
Onward Building Society *v.* Smithson, ix. 99.
Ooregum Gold Mining Co. *v.* Roper, viii. 187.
O'Reilly *v.* Glavey, ix. 306.
Osborne *v.* L. & N. W. Ry. Co., v. 100.
Otto *v.* Steel, ii. 282.

Page *v.* Midland Ry. Co. x. 107.
Page *v.* Morgan, i. 516.
Pain *v.* Boughtwood, vi. 238.
Palliser *v.* Gurney, iv. 111.
Palmer *v.* Wick and Pulteneytown Steam Shipping Co., x. 292.
Pandorf *v.* Hamilton, ii. 414, 535; iii. 112.
Paper Bottle Co., *In re*, v. 337.
Parish *v.* Hudson, *Re* Lucas, ii. 287.
Parsons, *Re*, vi. 468.
Patrick, *Re*, vii. 103.
Pearce *v.* Foster, iii. 105.
Pearson, *Re*, viii. 267.
Peek *v.* Derry, iv. 369; v. 101, 410; vii. 5, 309.
Pelton Bros. *v.* Harrison, vii. 312; viii. 107.
Penn *v.* Alexander, ix. 302.
Penny *v.* Hanson, iii. 359.
Perls *v.* Saalfeld, viii. 273.
Pescod *v.* Pescod, iv. 371.
Phillips *v.* Low, viii. 111.
Phillips *v.* Thomas, vi. 465.
Phipps *v.* Jackson, iii. 363.
Picker *v.* The London & County Banking Co., iii. 360.
Pike's Case, ix. 299.
Pilley *v.* Robinson, iv. 233.
Pittard *v.* Oliver, vii. 201.
Plenderleith, *Re*, x. 12.
Pollard *v.* Photographic Co., v. 226.
Ponting *v.* Noakes, x. 299.
Pooley, *In re*, v. 223.
Pope, *Re*, ii. 519.
Pounder *v.* N. E. Ry. Co., viii. 182.
Powell *v.* Hulkes, *In re* Hulkes, iii. 108.
Powell *v.* London & Provincial Bank, x. 11.
Priest *v.* Uppleby, *Re* Salmon, vi. 123.
Prytherch, *Re*, vi. 239.
Pullman *v.* Hill, vii. 201.
Pyle Works, *Re*, vi. 469.

Queensland, &c. Co., *Re*, vii. 308; viii. 102.

Radcliffe, *Re*, vii. 209.
Radcliffe *v.* Bartholomew, viii. 105.
Ratcliffe *v.* Evans, viii. 274; ix. 11.
Rayson *v.* South London Tramw. Co., x. 10.
Read *v.* Anderson, i. 134; v. 331.
Read *v.* Joannon, vi. 469.
Read *v.* Lincoln (Bishop of), vii. 98; ix. 9.
Reddaway *v.* Bentham House Spinning Co., ix. 13.
Redfern *v.* Redfern, vii. 105.
Reed & Co., *In re*, iii. 481.
Reg. *v.* Adams, v. 219.
Reg. *v.* Ashwell, ii. 283.
Reg. *v.* Bank of England, vii. 303.
Reg. *v.* Barnardo, v. 450.
Reg. *v.* Barnardo, Jones's Case, vii. 103.
Reg. *v.* Brown, vi. 237.
Reg. *v.* Buckmaster, iv. 240.
Reg. *v.* Cambridge University (V.-C. of), viii. 19.
Reg. *v.* Clarence, v. 219.
Reg. *v.* Commissioners of Income Tax, iv. 366; v. 220.
Reg. *v.* Cuming, iii. 481.
Reg. *v.* De Kromme, ix. 109.
Reg. *v.* Duckworth, viii. 277.
Reg. *v.* Dudley & Stephens, i. 282.
Reg. *v.* Dyson, x. 207.
Reg. *v.* Essex, ii. 531.
Reg. *v.* Flowers, ii. 419.
Reg. *v.* Foley, viii. 14.
Reg. *v.* Gibson, iii. 364.
Reg. *v.* Gordon, v. 450.
Reg. *v.* Gyngall, ix. 300.
Reg. *v.* Hopkins, ix. 207.
Reg. *v.* Jackson, vii. 207.
Reg. *v.* Judge of City of London Court, viii. 99.
Reg. *v.* Latimer, ii. 536.
Reg. *v.* Lloyd, iii. 482.
Reg. *v.* Lord Mayor of London, ii. 415.
Reg. *v.* McDonagh, viii. 15.
Reg. *v.* McDonald, i. 517.
Reg. *v.* McKenzie, ix. 15.
Reg. *v.* Peters, ii. 410.
Reg. *v.* Riley, iii. 364.
Reg. *v.* Russett, viii. 271.
Reg. *v.* Serné, iv. 489.
Reg. *v.* Smith, x. 107.
Reg. *v.* Snagge, x. 298.
Reg *v.* Tankard, x. 208.
Reg. *v.* Thompson, ix. 305.
Reg. *v.* Tolson, v. 449.
Reg. *v.* Tyler & International Commercial Co., viii. 8.
Reg. *v.* Villensky, ix. 17.
Reg. v. Webster, ii. 287.
Reichardt *v.* Sapte, x. 13.
Reld *v.* Reid, ii. 413.
Reid *v.* Rigby, x. 204.
Reinhardt *v.* Mentasti, vi. 114.
Rew *v.* Payne, ii. 415.
Rhodes, *Re*, vi. 352.
Rhodes, *In re*, Rhodes *v.* Rhodes, iv. 116.
Rhodes *v.* Swithenbank, v. 336.
Richards *v.* Butcher, vii. 311.
Richardson's Case, x. 205.
Richardson, *Re*, Shilleto *v.* Hobson, ii. 286.
Richardson *v.* Harrison, ii. 114.
Richardson *v.* Rowntree, x. 292.
Ridgeway *v.* Farndale, viii. 271.
Ridgway, *Ex parte*, ii. 116.
Rivett Carnac, *Re*, ii. 289.
Roberts *v.* Potts, ix. 308.
Robey & Co. *v.* The Snaefell Mining Co., iv. 233.
Robinson *v.* Kilvert, v. 337.

Robinson *v.* Shaw, *Re* Shaw, x. 299.
Robson, *Re*, vii. 307.
Rogers *v.* Lambert, vii. 103.
Rogers *v.* Maddocks, ix. 14.
Rolfe *v.* Thompson, viii. 273.
Roscoe *v.* Boden, x. 204.
Rosenberg *v.* Northumberland Building Society, v. 225.
Royal Aquarium Society *v.* Parkinson, viii. 182.
Royal College of Veterinary Surgeons *v.* Robinson, viii. 184.
Ruabon Brick Co. *v.* G. W. Ry. Co., ix. 204.
Russell *v.* Watts, ii. 118.
Rust *v.* Victoria Graving Dock, iii. 365.
Ryan *v.* Mutual Tontine Chambers Association, viii. 190; ix. 104.

Sacker, *In re*, v. 224.
St. Gobain, &c. Co. *v.* Hoyermann's Agency, ix. 302.
Salaman, *Ex parte*, i. 394.
Salaman *v.* Warner, vii. 306.
Salford (Mayor of) *v.* Lever, vi. 462; vii. 99.
Salmon, *Re*, Priest *v.* Uppleby, vi. 123.
Salomons *v.* Knight, vii. 301.
Salt *v.* Marquis of Northampton, viii. 110.
Sandbach & Edmondson's Contract, *Re*, vii. 107, 212.
Sandes *v.* Wildsmith, ix. 207.
Savery *v.* Enfield Local Board, ix. 298.
Saxby *v.* Thomas, vii. 107, 212.
Scanlan, *In re*, v. 225.
Schlesinger *v.* Bedford, vii. 108.
Schulze *v.* G. E. Ry. Co., iii. 480.
Scoles *v.* Brook, vii. 106.
Scott, *Re*, vii. 105.
Scott *v.* Attorney-General, iii. 113; vi. 460.
Scott *v.* Brown, ix. 105.
Scott *v.* Pape, ii. 410, 411.
Scott *v.* Sebright, iii. 252.
Seager, *Re*, Seeley *v.* Briggs, vi. 118.
Seagrove *v.* Parks, vii. 201.
Seale-Hayne *v.* Jodrell, viii. 5.
Searle *v.* Scarlett, viii. 277.
Seath *v.* Moore, ii. 534.
Seaton *v.* Seaton, iv. 371; v. 225.
Seroka *v.* Kattenburg, ii. 527.
Serrao *v.* Nowel, ii. 116.
Seton *v.* Lafone, iii. 252.
Seward *v.* The Vera Cruz, i. 278.
Sewell *v.* Burdick, i. 278.
Seyton, *In re*, Seyton *v.* Satterthwaite, iii. 361.
Shakespear, *Re*, ii. 116.
Shaw *v.* G. W. Ry. Co., x. 111.
Shaw, *Re*, Robinson *v.* Shaw, x. 299.
Sheffield Banking Co. *v.* Clayton, viii. 186.
Sheffield Building Society *v.* Aizlewood, vi. 469.
Sheffield (Earl of) *v.* London Joint Stock Bank, iv. 482.
Shenstone *v.* Hilton, x. 296.
Shephard, *Re*, Atkins *v.* Shephard, vi. 236.
Shephard, *Re*, vii. 305.
Shilleto *v.* Hobson, *Re* Richardson, ii. 286.
Shine, *Re*, viii. 184.
Shoppee *v.* Nathan, viii. 188.
Silverton *v.* Marriott, v. 103.
Simmonds, *Ex parte*, ii. 289.
Simmons *v.* London Joint Stock Bank, vii. 105.
Skinner *v.* Shew, ix. 205.
Smart *v.* Smart, ix. 10.
Smart *v.* Tranter, vi. 354.
Smith *v.* Baker, viii. 4.
Smith *v.* Cooke, viii. 108.
Smith *v.* Hancock, x. 106, 201.
Smith *v.* King, ix. 17.
Smith *v.* Land and House Property Corporation, i. 282.
Smith *v.* Smith, vi. 234.
Smith *v.* Wood, vi. 121, 237.
Smith's Settled Estates, *Re*, viii. 13.
Snow *v.* Whitehead, i. 136.
Snowden *v.* Baynes, vi. 470.
Société Générale de Paris *v.* Dreyfus, iv. 230.
Société Générale de Paris *v.* Walker, ii. 532.
Solicitor (In the matter of a), x. 15.
Soltykoff, vii. 105.
Somerset (Duke of), *In re*, iii. 255.
Somerset *v.* Poulett, x. 12.
Soper *v.* Arnold, vi. 123.
South Hetton, &c. Co. *v.* N. E. News Association, x. 103.
Spackman, *Re*, vi. 465.
Spicer *v.* Martin, v. 339.
Standing *v.* Bowring, ii. 289.
Stanley *v.* Powell, vii. 11.
Stanton *v.* Lambert, *In re* Lambert, v. 106.
Starey *v.* Chilworth Gunpowder Co., vi. 239.
Starr-Bowkett Building Society, *Re*, vi. 116.
Stephens *v.* L. & S. W. Ry. Co., iii. 250.
Stepney Election Petition, The, ii. 420.
Stettin, The, vi. 123.
Stevens *v.* Bishop, iv. 366.
Stewart *v.* Casey, viii. 108.
Stewart *v.* Merchants' Marine Insurance Co., ii. 286.
Stock and Share Auction, &c. Co., x. 206.
Stoddart *v.* Savile, x. 299.
Stogdon *v.* Lee, vii. 205.
Stoneham *v.* Ocean, &c. Accident Insurance Co., iii. 483.
Stonor *v.* Fowle, iv. 362; vi. 119.
Story *v.* Sheard, ix. 17.
Stratheden, *Re*, x. 301.
Stuart *v.* Bell, vii. 304.
Stuart *v.* Diplock, vi. 357.
Studdert *v.* Grosvenor, ii. 534.
Summers *v.* Holborn Board of Works, ix. 207.
Sun Fire Office *v.* Hart, v. 336.
Surman *v.* Wharton, vii. 206.
Sutton *v.* Grey, x. 110.
Swain, *Re*, viii. 6.
Swaine *v.* Wilson, vi. 241.
Swinburn *v.* Ainslie, ii. 118.
Synge *v.* Synge, x. 103.

Tadman *v.* Henman, ix. 309.
Tamplin, In the Goods of, x. 108.
Tassell *v.* Hallen, viii. 104.
Tatam *v.* Reeve, ix. 108.
Taws *v.* Knowles, viii. 111.
Taylor, *In re*, iii. 253.
Taylor *v.* Russell, vii. 106.
Taylor *v.* Smith, ix. 101, 301.
Taylor *v.* Timson, iv. 371.
Temperton *v.* Russell, ix. 202.
Tennant *v.* Smith, viii. 276.
Terry and White's Contract, *Re*, ii. 414.
Thames & Mersey Marine Insurance Co. *v.* Hamilton, iii. 471.
Thiodon *v.* Tindall, viii. 113.
Thomas *v.* Duchess of Hamilton, iii. 105.
Thomas *v.* Kelly, v. 108.
Thomas *v.* Quartermaine, ii. 526; iii. 365.
Thompson *v.* Palmer, ix. 302.
Thorne *v.* Heard, x. 201.
Thrussell *v.* Handyside, iv. 239.
Thynne *v.* Shove, vi. 467; vii. 3.
Tilbury *v.* Silva, vii. 2.
Tod-Heatly *v.* Benham, v. 223.
Tolhausen *v.* Davies, iv. 488.
Tomkins *v.* Jones, v. 333.
Tomlinson *v.* Balke's Consolidated Co., viii. 7.
Trade Auxiliary Co. *v.* Middlesborough Tradesmen's Association, v. 339.
Trafford *v.* Blanc, iv. 231.
Trevor *v.* Whitworth, iii. 488; iv. 237; v. 221.
Tuck *v.* Priester, iv. 118.
Tuck *v.* Southern Counties Deposit Bank, vi. 233.
Tucker *v.* Bennett, iv. 370.
Tullis *v.* Jacson, ix. 18.
Turner *v.* Goldsmith, vii. 202.
Turner *v.* Hockey, viii. 114.
Turner *v.* Mersey Docks & Harbour Board, ix. 14.
Turton *v.* Turton, vi. 117.
Tussaud *v.* Tussaud, vi. 464.
Tyars *v.* Alsop, vi. 119.
Tyler, *Re*, viii. 110.
Tyrrell *v.* Painton, x. 201.

Ultzen *v.* Nicols, x. 108.
Union Bank *v.* Munster, iv. 236.
United States *v.* Pacific R. R., iii. 247.
Urquhart *v.* Butterfield, iv. 368.

Vagliano *v.* Bank of England, v. 457; vii. 97, 295.
Valada *v.* Lawes, vi. 460.
Valdez's Trusts, *In re*, v. 223.
Valentini *v.* Canali, vi. 241.
Van Duzer's Trade Mark, iii. 362.
Vansittart, *Re*, x. 15.
Vardon's Trusts, *Re*, ii. 288, 411.
Vaucher *v.* Solicitor to the Treasury, iv. 486.
Verner *v.* General, &c. Investment Trust, x. 206.
Vibart *v.* Coles, vi. 351.
Vilmont *v.* Bentley, iii. 253.
Vyse *v.* Foster, iii. 211.

Wakelin *v.* L. & S. W. Ry. Co., iii. 249.
Walker *v.* Baird, ix. 8.
Walker *v.* G. N. Ry. Co. of Ireland, viii. 16.
Walker *v.* Hirsh, i. 135.
Walker *v.* Hobbs, vi. 120.
Walker *v.* Midland Ry. Co., iii. 249.
Wallace *v.* Universal Automatic Machines Co., x. 202.
Walter D. Wallett, The, ix. 308.
Walter *v.* Everard, vii. 313.
Walter *v.* Steinkopff, ix. 16.
Walsh *v.* Whiteley, v. 100.
Ward *v.* Duncombe, x. 6.
Ward *v.* Wood, *Re* Wood, ii. 535.
Warter *v.* Warter, vi. 460.
Washington Diamond Mining Co., *Re*, x. 11.
Watson & Sons, *Re*, vii. 209.
Watson, *Re*, ix. 106.
Watteau *v.* Fenwick, ix. 111.
Webster *v.* Friedberg, ii. 530.
Wegg-Prosser *v.* Evans, x. 203.
Weldon *v.* De Bathe, i. 281.
Weldon *v.* Winslow, i. 135.
Wenlock (Baroness) *v.* River Dee Co., iii. 487.
Wennhak *v.* Morgan, iv. 367.
Werle *v.* Colquhoun, iv. 486.
West *v.* Wythes, *Re* Wythes, ix. 298; x. 107.
Western Bank of New York *v.* Perez, vii. 101, 201.
Western Suburban and Notting Hill, &c. Building Society *v.* Martyn, iii. 113.
Wheaton *v.* Maple & Co., x. 8.
Wheeler *v.* New Brunswick, &c. R. R. Co., ii. 285.
Whitaker, *Re*, vi. 120.
Whitby *v.* Mitchell, vi. 350.
White, *Re*, ix. 208.
Whitehead Chemical Co. *v.* Hardman, xii. 207.
Whitham *v.* Kershaw, ii. 412.
Whittaker *v.* Kershaw, vii. 8.
Whittingham *v.* Murdy, vi. 118.
Whitwood Chemical Co. *v.* Hardman, xii. 311.
Whitworth *v.* Whitworth, x. 13.
Wiedemann *v.* Walpole, vi. 354; viii. 9, 112.
Willetts *v.* Watt, viii. 279.
Williams *v.* Colonial Bank, iv. 118.
Willis *v.* Baddeley, viii. 266.
Willis *v.* Earl Howe, x. 7.
Wilson *v.* Glossop, iv. 111.
Wilson *v.* Miles Platting Building Society, v. 226.
Windhill Local Board of Health *v.* Vint, vii. 3.
Wingrove *v.* Wingrove, ii. 416.
Witted *v.* Galbraith, ix. 297.
Wood, *Re*, Ward *v.* Wood, ii. 535.

Wood *v.* Burgess, vi. 239.
Wood *v.* Durham, v. 105.
Woodward *v.* Goulstone, vi. 465.
Woolcott *v.* Peggie, vi. 241.
Worcester City, &c. Banking Co. *v.* Firbank, x. 197.
Wythes, *Re*, West *v.* Wythes, ix. 298; x. 107.

X, *Re*, x. 300.
Xantho, The, iii. 472.

Yarrow, *Re*, *Ex parte* Collins, vi. 232.
Yates, *In re*, Bacheldor *v.* Yates, iv. 370.
Yeoland Consols, *In re*, v. 105.

Zeta, The, viii. 99; ix. 14.

Oxford
HORACE HART, PRINTER TO THE UNIVERSITY

Stanford Law Library
3 6105 06 129 489 3